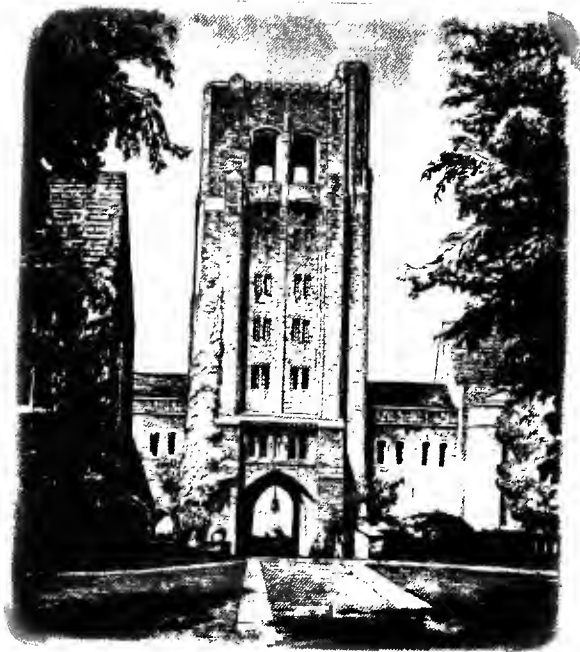




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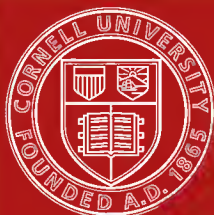
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Foreign companies and other corporations



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# FOREIGN COMPANIES AND OTHER CORPORATIONS

by  
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## PREFACE

IN the year 1904 it fell to my lot to give some consideration to the case of *Risdon Iron Works v. Furness* (p. 185 post). Search for authority about the knotty points involved showed how little consideration had been given to them in this country. These pages, the outcome of that search, are an attempt rather to open up the subject to discussion than to provide a full or final solution.

A word of explanation seems necessary as to the use made of authorities. In the first part, which deals with theories, and for the most part foreign theories, I have relied principally on the writings of authors of recognised authority. According to continental ideas, a decision is worth no more than the reasoning by which it is supported. The learned text books in which the reasoning of judges is compressed and analysed are therefore as good a source of law as the judgments themselves. In the second part, which deals with English law, I have relied wholly on the authority of reported decisions, as far as they go.

Part of the substance of the first section has been utilised in articles which appeared in the *Law Quarterly Review* in Vol. XXIII. pp. 151 and 290, and in the *Harvard Law Review* in Vol. XXII. p. 1.

To my father, to Sir Courteney Ilbert, G.C.B., K.C.S.I., and to Mr E. M. Pollock, K.C., I owe much gratitude for reading parts of this work in manuscript, and for suggestions which have been of great value to me.

E. H. Y.

October, 1911

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## LIST OF ABBREVIATIONS

- Arminjon*="Nationalité des Personnes Morales" in *Revue de Droit International*, 1902, at p. 381.
- Asser and Rivier*=*Éléments de Droit International Privé ou du Conflit des lois*. 1884.
- Aubry and Rau*=*Cours de droit civil Français*. 4th ed. Paris 1869-83.
- Brocher*=*Droit International Privé*. Geneva 1876.
- Calvo*=*Le Droit International Théorique et Pratique*. 4th ed. Paris, Berlin, 1888.
- Chervet*=*Des Sociétés Commerciales en Droit International Privé*. Paris 1886.
- Clunet*=*Journal du Droit International Privé et de la Jurisprudence Comparée*, ed. Clunet. Paris, periodical.
- Daloz*=*Jurisprudence Générale: Recueil périodique et critique*, ed. Dalloz. Paris, periodical.
- Despagnet*=*Précis de Droit International Privé*. Paris 1886.
- Dicey*=*A Digest of the law of England with reference to the Conflict of Laws*. 2nd ed. London 1908.
- Diena*=*Trattato di Diritto Commerciale Internazionale*, vol. I. Firenze 1900.
- Dudley Field*=*Draft outlines of an International code*. New York 1872.
- Fiore*=*Diritto Internazionale Privato*. 3rd ed. Turin 1888.
- Foelix*=*Traité de Droit International Privé*. Paris 1856.
- Foote*=*Private International Jurisprudence*. 3rd edit.
- Fromageot*=*De la double Nationalité des individus et des sociétés*. Paris 1891.
- Haladjian*=*Des Personnes Morales Étrangères*. Paris 1901.
- Lainé*=*Des Personnes Morales en Droit International Privé*, in *Clunet*, 1893, p. 273.
- Laurent*=*Droit Civil International*. Bruxelles, Paris, 1880.
- Lyon-Caen and Renault*=*Traité de Droit Commercial*. 2nd ed. 1892. Vol. II.
- Mamelok*=*Die juristische Person in internationalen Privatrecht*. Zürich 1900.
- Morawetz*=*The Law of Private Corporations*. 1886.

- Moreau* = De la Capacité des États étrangers pour recevoir par testament en France, in *Clunet*, 1892, at p. 337.
- Murfree* = Law of Foreign Corporations : a discussion of the principles of Private International Law. St Louis 1893.
- Pic* = De la faillite et de la liquidation judiciaire des sociétés commerciales en Droit International Privé, in *Clunet*, 1892, at p. 577.
- Pillet* = Principe de Droit International Privé. 1903.
- Pineau* = Des Sociétés Commerciales en Droit International Privé. Paris 1894.
- Rattigan* = Private International Law. 1895.
- Revue* = Revue de Droit International et de législation comparée. *Brussels*: Hague. Paris, periodical.
- Rolin* = Principes du Droit International Privé. Paris 1897.
- Sacopoulo* = Des Personnes Morales en Droit International Privé. Genève 1898.
- Savigny* = System des heutigen Römischen Rechts. Berlin 1849.
- Sirey* = Recueil Général des Lois et des Arrêts. Paris, periodical.
- Story* = Commentaries on the Conflict of Laws. 8th ed. (Bigelow). Boston 1883.
- Surville and Arthuys* = Cours élémentaire de Droit International Privé. 4th ed. 1904.
- Thompson* = Commentaries on the Law of Corporations. 1896.
- Vavasseur* = Des sociétés constituées à l'étranger et fonctionnant en France, in *Clunet*, 1874, at p. 345.
- Vincent and Pénaud* = Dictionnaire de Droit International Privé. 1888.
- Von Bar* = The Theory and Practice of Private International Law, translated Gillespie. 2nd ed. Edinburgh 1892.
- Weiss* = Traité Théorique et Pratique de Droit International Privé. Vol. 11. Le droit de l'étranger. Paris 1892.
- Westlake* = A Treatise on Private International Law. 4th ed. 1905.
- Wharton* = Conflict of Laws. 1881.



# PART I

## THE JURISTIC PERSON IN PRIVATE INTERNATIONAL LAW

### CHAPTER I

#### INTRODUCTORY

INTEREST in the subjects which are dealt with in the following pages is of recent growth. Practically no reference to them, or discussion of the questions which they involve, is to be found in the writings of jurists or in the decisions of judges before the beginning of the nineteenth century. At that time associations of various sorts had, indeed, already for many centuries played a prominent part in international trade: but the theoretic aspect of the legal character of the acts performed by them outside their states of origin had attracted little attention. In part, no doubt, this was due to the condition of the science of jurisprudence, which did not, until the beginning of the nineteenth century, attain such a stage of development as to be able clearly to conceive the nature of the legal problems involved in such acts, still less to suggest their true solution. In part also it was due to special circumstances in the nature of the earlier international trading associations, and in the history of their growth. It may be of interest to trace briefly the succession of events which have produced a situation in which the juristic person<sup>1</sup> forces itself upon the attention of students of private international law.

<sup>1</sup> A juristic person is a "subject" of rights which is not a natural person. The phrase is used here throughout instead of "corporation" as the more inclusive term, since there are many juristic persons that are not corporations, *e.g.* the French *Société en nom collectif*. Civil, moral, and juridical person are synonymous phrases. All alike are open to objection, juristic and juridical person on the grounds that they are equally applicable, civil and moral on the grounds that they are even more applicable, to a natural person. In the absence of any better reason juristic person is adopted here because it has been previously used by several English writers. The phrases subject and object of rights are used throughout in the convenient sense in which they are used by continental writers, the subject to express the person who has the right, the object to express the thing over which the right is exercised.

I. The evolution of commercial associations took place in early times along two independent lines of development, and it was not until the beginning of the 17th century that the two united. When Europe emerged from the dark ages, the commercial associations which began to spring up in its southern regions owed their vigour to Italian wealth, and their form to Italian habits of thought. The ideas of association which were prevalent amongst the merchants of Florence, Genoa, and Venice, being derived, however indirectly, from the clear and refined conceptions of juristic personality to which Roman law had attained in the days of the classical jurisprudence, were far in advance of those of northern Europe. They associated themselves for business purposes only, forming associations rather of capital than of men, the members of which were connected together to the extent only to which their commercial interests were involved. From the earliest times they were organised on scientific principles of trading, with a joint stock, or with a capital subscribed *en commandite*. The great naval expedition, for instance, which was sent annually from Venice during the 14th and 15th centuries, to trade in the Levant, was conducted commercially upon the joint stock principle. It was considered that the sailors invested their labours, the merchants the services which they rendered, the manufacturers their goods, and the patricians their capital: all shared in the dividends, and the internal management of the undertaking was under the control of delegates elected by the investors, but the business was conducted by the merchants as directors<sup>1</sup>. The business of the Florentine, Genoese, and Milanese bankers, popularly known as Lombards, who from the 11th century onwards spread their operations northwards over Europe, was conducted on the principle of the *commandite*. An agent, resident in London, or Paris, or other foreign town, acted as the mandatory of an association of Italian capitalists, who entrusted part of their capital to him for investment. The associations were temporary and limited to particular undertakings, so that a single wealthy Florentine might be employing his resources through several mandatories at once<sup>2</sup>, and they were

<sup>1</sup> Marin, *Storia del commercio de Veneziani*, IV., ch. iii.

<sup>2</sup> Frignet, *Histoire de l'association commerciale*, p. 112.

thus possessed of all the essential characteristics of the modern association *en commandite*.

It was at a very early date that the Italian business world discovered the benefits of joint stock trading, and developed and perfected the system, especially for the purposes of high finance. From the 14th century onwards various great banking associations were conducted on this principle. The oldest and the most noteworthy was the Genoese Bank of St George, the origin of which dates back to the first crusade (1100 A.D.). Money to fit out a contingent for the crusade was lent to the Republic on the security of certain taxes, and the lenders formed a society for the purpose of collecting them. The capital involved was divided into equal shares which could be transferred; the revenues were distributed amongst the shareholders; and Consuls were elected by them to conduct the business of the society. The institution took root and developed a flourishing banking trade throughout the Mediterranean area; and in the 15th century it became the leading financial house in Europe, and a political power<sup>1</sup>.

2. In northern Europe, on the other hand, commercial association grew from a different root, and assumed a different form. The parent stock was the Teutonic guild, which was an association of craftsmen for the purposes of their trade, and in which, since the society was concerned not only with the business of its members, but with the regulation of their whole lives, there was an association, not of capital only, but of men. As the joint stock company with limited liability is the highest development of the Italian idea of association, so was the mediaeval monastic or military order the highest development of the Teutonic idea. The conception that an association consisted of men living a common life according to the rule of the society being inseparable from the very idea of association amongst Teutonic nations, moulded the form of commercial associations as well as that of associations for religious or political objects: and when companies of merchants began to be formed for the purposes of international trade, they were organised as guilds, the members living together under the discipline of the society. The earliest instance of such merchant guilds may be found in the private hanses organised by

The Regulated  
Guild in  
northern  
Europe.

<sup>1</sup> Wiszniewski, *La Banque de Saint-Georges*.

the merchant communities of Germany for the purpose of mutual self defence in foreign trade. The Hanseatic League displayed during the 13th, 14th, and 15th centuries the adaptation and full development of the same system for the purposes of international commerce, and during the 16th century its failure and decline. Although assuming sovereign rights, and commanding powerful fleets and an army of knights of the Teutonic order, it was in its essence a business association of merchant communities rather than a territorial association of cities. There was no joint stock; each member traded on his own account, and the functions of the League were to regulate the relations between the members. In the foreign stations the residents lived under a strict rule: thus at the Steelyard in London the merchants of the hanse slept and ate together in a single building, and their ways of life were controlled by a patriarchal government.

The rivals and successors of the Hanseatic League in the sovereignty of the trade of northern Europe, the English Companies of the Merchants of the Staple and of the Merchant Adventurers, otherwise known as the fraternity of St Thomas à Becket, exhibited in the nature of their organisation the same characteristics of the Teutonic idea of association. These, the first of the chartered companies, during the formative period of their history, were similar in character to ordinary guilds, and the Merchant Adventurers claimed specifically to be descendants of the Mercers' guild<sup>1</sup>.

When the prosperity of the latter culminated in 1579, and a long struggle with the Hanseatic League was ended in their favour by the withdrawal of the German merchants from England<sup>2</sup>, they were still organised upon the same basis, and, like the merchants of the Hanse, had no joint stock. "The Company of Merchant

<sup>1</sup> Their corporate existence was of gradual growth, developing by means of charters granted to separate communities of English merchants in foreign towns, e.g. by Richard II in 1391 to those in Prussia and the Hanse Towns; by Henry IV in 1404 to the same; and in 1407 to those in Holland, Zealand, Brabant, and Flanders, and later in Norway, Sweden and Denmark. (Cunningham, *Growth of English Industry and Commerce*, 4th ed., vol. 1., § 122.) The Merchants of the Staple first became an English Association about the middle of the 14th century. (Cawston and Keane, *The Early Chartered Companies*, p. 17.) They were superseded in importance by the Merchant Adventurers, who claimed to have been founded in the 13th century, but were not formally recognised till 1505 and did not receive their definite corporate constitution till 1564.

<sup>2</sup> Cunningham, *op. cit.*, vol. II., § 189.



Adventurers," says Wheeler, their Secretary and Chronicler, "hath no banke nor common stocke, nor common factour to buy or sell for the whole companie, but everie man tradeth a-part, and particularlie with his own stocke, and with his own factour or servaunt<sup>1</sup>."

In their foreign factories also the members, like the merchants of the Hanse, lived together and by rule: and the chief functions of the corporation were to regulate admission to the trade, to restrict the amount of business which each merchant might undertake by imposing a "stint" upon his exports, and generally to regulate the relations between its members<sup>2</sup>.

To such companies, in order to lay stress upon these special characteristics, there has been given the name of 'regulated' companies. The Teutonic 'regulated' company was therefore an association of men who lived and traded together by rule, but conducted their business independently, each for his own benefit. The Italian joint stock company was and is an association by which a single business is conducted for the common benefit of all the members. When the two met in competition the joint stock company prevailed<sup>3</sup>. But while the Elizabethan age of discovery was giving its great impulse to international commerce, the regulated company was still the popular and natural form of association in northern Europe, and it was this form that was first utilised and adapted to meet the needs of the new condition of affairs<sup>4</sup>. In the latter part of the 16th century the number and activities of 'regulated' chartered companies began rapidly to increase, assisted by the new-found opportunities for foreign trade, and by the policy of Burleigh. Their forerunner was the Muscovy Company, which was chartered by Queen Mary in 1553 in consequence of Sir Hugh Willoughby's expedition to the North-East. In 1597 Queen Elizabeth chartered the Eastland Company, to capture the trade of the declining Hanse in Scandinavia, Poland, and the German Baltic. The Levant Company followed in 1581: and the first charter of the East India Company was granted in 1599. Minor companies also chartered about this period

<sup>1</sup> *Treatise of Commerce*, p. 102.

<sup>2</sup> Cunningham, *op. cit.*, vol. II., § 189.

<sup>3</sup> Lingelbach, "The Internal Organization of the Merchant Adventurers of England," *Transact. Royal Hist. Soc.* N.S., vol. XVI.

were the first Guinea Company (1588) and the Barbary Company (1585). England's commercial rival hastened to follow her example. In 1602 the States General of Holland fused a number of small privileged associations into the Dutch East India Company, and, later, created by a similar process the Dutch West India Company, besides other smaller associations.

3. The creation of the Dutch East India Company marks the arrival of the joint stock principle in northern Europe. The

The spread of  
the joint stock  
principle.

old system of regulation was beginning to be found unsuitable to the extended requirements of commerce. At the same time, Italian ideas of association had been becoming familiar in the North. Jean Cabot organised the finances of his voyage from Bristol on the joint stock principle in 1496. The system was seen to provide a method of organisation suited to the new circumstances. Already the Muscovy Company had been carrying on its business on the joint stock system, apparently as a matter of convenience. The Dutch East India Company was from the outset organised as a federation of joint stock companies, the shareholders' chamber in each town being partly independent, and partly controlled by the central chamber of Amsterdam. The popularity of the new system spread to England, and in 1612 the East India Company was reorganised as a joint stock undertaking. Thenceforward in the sphere of international commerce the decline of the regulated chartered companies before the joint stock chartered companies was continuous, and the process of decay became accelerated when the regulated companies were thrown open by the Commonwealth<sup>1</sup>.

The prosperity and numbers of the joint stock companies grew proportionately. For the purposes of international commerce there were created in England during the 17th century the Royal African Company, reorganised from the former regulated Guinea Company and chartered as a joint stock company in 1672; and the Hudson Bay Company, chartered in 1670, which still survives and flourishes. Amongst similar companies chartered by other states the most prominent were the ill-fated group of privileged companies created by Colbert

<sup>1</sup> Cunningham, *op. cit.*, vol. III., § 274. *Joint Stock Companies to 1720*, W. R. Scott (Camb. Univ. Press), now (1911) in course of publication is a detailed history of the development of the chartered companies.

to develop French trade; an East India Company in 1664 to compete with the Dutch East India Company, and in the same year a Company of the American Continent; in 1668 a Northern Company to monopolise trade in the North Sea and the Baltic, a Levant Company, and an abortive Pyrenees Company; all of which, however, languished and died, or survived as mere agents of the French government.

4. Until joint stock companies had in this manner become numerous and well established in international commerce, law-

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yers were not likely to be concerned with questions relating to the status of foreign juristic persons.

In the regulated company, the personality of the association stood behind the members. It was the latter that sued, and contracted, and owned property, and appeared as subjects of rights in general in the local law of foreign states, while the functions of the association were limited to controlling the relations of the members to each other. With these relations, which affected only foreigners and not its own citizens, the territorial law had no reason to concern itself. Besides, in so far as the association itself, in its duties of internal management or in its rights of privileged trade, was likely to come into contact with the local law and sovereignty, the possibility of conflict was prudently foreseen and obviated by the preliminary precaution of obtaining an express recognition and confirmation of the privileges of the association from the foreign sovereign. The merchants of the Hanse, for instance, trading at the Steelyard, were granted a privileged position by charters from Henry III in 1232, and from Edward IV after the treaty of Utrecht<sup>1</sup>. The Merchants of the Staple claimed that they had received a charter from John Duke of Brabant in 1248 conferring on them privileges in the Netherlands, and the Merchant Adventurers received a similar charter from Count Louis of Flanders in 1258<sup>2</sup>. The Muscovy Company obtained privileges from the Czar soon after its incorporation (1555), and later, as it extended its operations, from the Shah (1566) and the King of Denmark (1583)<sup>3</sup>. The Levant Company was officially recognised by the Sultans: and upon the

<sup>1</sup> Cunningham, *op. cit.*, vol. II., § 189.

<sup>2</sup> Cawston and Keane, *op. cit.*, pp. 15 and 20.

<sup>3</sup> Cawston and Keane, *op. cit.*, p. 33 et seq.

institution of the East India Company and the Barbary Company, embassies were sent by Queen Elizabeth to the Great Mogul and to the Sultan of Morocco respectively, in order to obtain from them confirmation for the privileges of the companies<sup>1</sup>.

In the foreign operations of the early associations *en commandite* also it was a natural person who appeared as the subject of rights in the local law of foreign states. But with the joint stock association it was otherwise. In this form of association it is the members who stand behind the association, and it is the association itself that sues, contracts, owns property, and, when it operates abroad, appears as a subject of rights in the territorial law. The company itself contracts legal relations with the citizens of the foreign state, and the state must therefore, if it is called upon to interfere in those relations, concern itself with questions concerning the status of the company. Several causes however tended to postpone discussion of such questions until long after joint stock associations had assumed a position of importance in international commerce.

At first such companies were for the most part formed in order to trade in barbarous countries without any settled legal system. After the 16th century the constitution of a chartered company seems to have been unsuitable for trading with accessible and civilised countries, and those such as the Eastland Company, which were formed for the purposes of trade of this nature, languished and died. In the uncivilised countries in which the companies flourished, in the East Indies, for instance, in Hudson's Bay, and in the South Seas, there were no lawyers to concern themselves with the status of the European merchants, or, at least, such lawyers as there were would not have been allowed to do so.

Again, in uncivilised lands many of the companies possessed rights either of actual or virtual sovereignty. The East India Company acquired its first sovereign rights as early as 1623; the Hudson Bay Company ruled in northern Canada, and exercised there the power of peace and war; the Bermuda Company ruled the Bermudas; the "provincial charters" of the companies which colonised North America delegated to them many sovereign powers; and where the company was itself sovereign, no question could arise as to its status.

<sup>1</sup> Cawston and Keane, *op. cit.*, pp. 89 and 236.

But still there were, no doubt, exceptional instances which were subject to none of these excluding circumstances. Some mediaeval lawyer, of subtlety in advance of his age, might have earned the gratitude of his sovereign by arguing that the latter was not bound to pay his debts to the Bank of St George, for instance, because that company was a Genoese institution which, as a fiction of Genoese law, could have no existence on foreign soil. The reason that he did not do so must be sought, not in the circumstances of the case, but in the nature of his own conception of the legal ideas involved. It will be seen that the modern discussion of the status of a juristic person outside its state of origin has been caused by the difficulty of reconciling, under these circumstances, highly technical theories as to the nature of juristic personality with similar theories as to the extra-territorial effect of laws. Such theories are of modern growth, and until they had become clearly formulated, the discussion could not arise in any definite manner. It was not until the writers on the customs of the French provinces, and their opponents, had analysed the nature of the extra-territorial force of laws, and until clear conceptions of the nature of juristic personality had been suggested by study of the Civil Law, that it could occur to jurists that it was difficult for a juristic person to exist outside its state of origin.

5. The growth of such legal studies has been accompanied by increased opportunities for the practical application of their conclusions. During the nineteenth century there has taken place that enormous increase in the numbers and activities of commercial associations which has had so great an influence on many provinces of law and which has, in particular, provided so much material for the discussion of the position of juristic persons in private international law. As the magnitude of modern trading operations and business undertakings has made it more and more impossible for the accumulated capital of a single person to provide means for their performance, the larger spheres of commercial interest have become closed to individuals, and for the conduct of all important commerce and industrial production association of capital has become the rule rather than the exception. Commerce, in so far as it consists of exchanges between parts of the globe with different climates, natural

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resources, and productive powers in general, is necessarily international, and has become so increasingly as civilisation has increased in complexity, and as it has become more and more impossible for any single country to supply all the wants of its inhabitants. Associated capital has consequently been tending to become denationalised and, losing its connection with particular countries, to take the form of a general and international pool. The shares of a new company, or the stock of a new Government loan, for instance, are frequently issued for subscription in several countries at once, and capital is frequently placed with foreign bankers for investment; so that the same undertaking may be supported by resources drawn from many different countries. Such influences as these have forced juristic persons into a position of greatly increased prominence in international relations. The economic necessities of men compel them to form associations, and compel those associations to pursue their operations without regard to territorial limitations.

In proportion as juristic persons have multiplied at home, and increased their activities in international trade, they have also gained importance in the arena of private international law. In England, as it will be seen, the foreign juristic person has been taken very much for granted. But in many continental countries, and in the United States, where the independent sovereignties of the several states produce a swarm of juristic persons, operating in close contact, and each appearing as a foreigner beyond the arbitrary barrier of a state boundary, much attention has been paid to them by jurists, judges, and statesmen. The invasion of foreign juristic persons, and especially of commercial associations with liabilities limited by shares, has led these authorities to formulate, and to attempt to answer, the questions of scientific jurisprudence involved in the nature of their existence, status, and capacities.

The discussion of the subject may be said to have been begun by Merlin, the Gaius of the *Code Napoléon*, in whose *Répertoire* the fundamental problem as to the nature of the status and capacity of a foreign juristic person was first stated, and a solution offered. "As soon as a corporation (*corps*) has acquired a legitimate existence," he writes, "its existence and its capacity should be recognised in respect of its property, even when the latter is situated outside the sphere of the law which

gave it both existence and capacity<sup>1</sup>." The proposition is stated as if it were obvious and needed no discussion. But as soon as general attention began to be attracted to the question it appeared that it could not be so summarily dismissed. In 1834 Story revived the study of private international law; and it was in the United States, and under his influence, that the theoretical aspects of the subject were first discussed at large. In 1839 Mr Chief Justice Taney delivered the judgment of the Supreme Court in the case of the Bank of Augusta v. Earle, in which he stated a principle which was the converse of that stated by Merlin, and which has served ever since as the foundation both of positive law and of abstract discussion for American lawyers. The new doctrine soon found a fresh and important field of activity. Belgium was suffering from an invasion of French *sociétés anonymes*; and in 1847 the Belgian *Cour de Cassation* decided that French *sociétés anonymes* had no civil personality in Belgium, basing their decision upon a development of Taney's reasoning in the direction of even greater hostility towards foreign juristic persons, propounded by the *procureur général* Leclercq. Retaliations were threatened in France, and the dispute, known as "*L'Affaire des sociétés anonymes*," lasted till set at rest by the Belgian law of 1855 March 14th, and the French law of 1857 May 30th, providing that the *sociétés anonymes* of each nation should enjoy civil rights before the tribunals of the other. But subsequently the French tribunals, in considering the position of foreign juristic persons to which the law of 1857 did not apply, adopted the restrictive reasoning of the Belgian *Cour de Cassation*; and the same doctrines were advocated with great energy by the eminent Belgian jurist Laurent, who found in them a basis upon which he could construct a theory hostile to foreign juristic persons, and thus in harmony with his tenet that incorporation for any purpose is an evil, and that incorporation for religious purposes is particularly so. His reasoning has been severely criticised by almost all the many eminent authors who have since paid attention to the subject: and by force of contrast a rival system has been established, which returns to the doctrine of Merlin, and is thus more liberal in its tendency. The foundations of the latter may be said to have been laid by Fiore in Italy, and Von Bar in

<sup>1</sup> Merlin, *Répertoire*, tit. *gens de mains-morte*, § 7, Nos. 1 and 2.

Germany, and the structure to have been completed by Lainé and Lyon-Caen in France.

The principal cause of the increased attention thus paid to the subject is no doubt the increase in the activities of joint stock associations to which reference has been made: but two celebrated contests of international importance have had so marked an effect in stimulating the discussion that they deserve special mention. Both contests involved the right of one state to take by devise real estate situated within the territories of another.

The first affair was that of Vanghely Zappa, who died in Roumania in the year 1865, leaving a reversionary interest in certain Roumanian real estate to the Greek nation. In 1891 the life tenant died, and Greece claimed the estate. The Roumanian Government intervened, and contended that the Greek state, as a foreign juristic person, was incapable of taking the estate. Greece objected to the competence of the Roumanian Courts to decide the dispute, and suggested arbitration. Roumania declined; and the Greek Ambassador was withdrawn from Bucharest<sup>1</sup>.

The second affair was that of the Marquise de Plessis-Bellière, who bequeathed by her will certain real estate in France to Pope Leo XIII. In interpreting the will the tribunal of Montdidier decided, firstly, that the devise was made to the Pope as representative of the Papacy and head of a foreign state; and, secondly, that foreign states were possessed of civil personality in France<sup>2</sup>. The Court of Appeal of Amiens differed from this decision, on the grounds that the devise was made to the Pope, not as head of a foreign state, but as head of the Roman Catholic Church, and that the second point was consequently immaterial, a decision which was reversed in its turn by the *Cour de Cassation*, which gave no reasons for its judgment<sup>3</sup>.

In the course of the Zappa affair many distinguished lawyers were consulted by the contending governments and furnished opinions which are, in fact, treatises on this branch of the law<sup>4</sup>,

<sup>1</sup> *Archives Diplomatiques*, 1893, part 1, 307; part 2, 117; part 3, 181; and part 4, 127; and *Revue de Droit International*, 1894, p. 165.

<sup>2</sup> Clunet, 1892, p. 447.

<sup>3</sup> Clunet, 1894, p. 835.

<sup>4</sup> See especially opinions of Weiss, *Archives Diplomatiques*, 1893, part 4, p. 127; Lainé, ditto, p. 135; and "Opinion furnished by the Berlin Faculty of Law," Clunet, 1893, p. 727.



together with various questions of public international law, and the discussion was vigorously pursued by others<sup>1</sup>. The Plessis-Bellière affair also gave rise to exhaustive discussions amongst French lawyers. In both cases the primary subjects under consideration were the status and capacity of foreign states, and the jurisdiction which should be exercised over them by the territorial tribunals. But in legal systems founded on the law of Imperial Rome, which personified the fisc, and not upon the common law, which knows only of a royal corporation sole, the state possesses juristic personality; and in order to solve such problems for a particular class of juristic persons, it was necessary to settle, in the first place, the principles which relate to the position of foreign juristic persons in general.

The discussions thus induced have had some definite results. In many countries the prevalent doctrine, whatever it may be, has been<sup>2</sup> embodied in a law or code, or has served as a guide to the national policy in making treaties with other countries for the mutual recognition of some class of juristic person.

6. In such expressions of opinion, whether in positive laws or in theoretical discussions, there has been a gradual change in the point of view from which the foreign juristic person has been contemplated. There has been in the first place a change in public opinion about juristic persons in general. Before the beginning of the great increase which the 19th century has seen in the activities of commercial associations, the juristic person was not favoured by the law or by the policy of civilised states. Its personality was looked upon as a loan or franchise; to grant it was a royal prerogative and to usurp it without permission was punishable. In common opinion a juristic person, with its quality of continuity, and its tendency to accumulate and sterilise the means of production, was an object of suspicion, to be created sparingly and to be restricted carefully. The nineteenth century has seen a reversal of this opinion. It has become apparent that there is a necessity which compels the formation of associations to satisfy those numerous needs of civilised man which it is beyond the

Public Opinion  
regarding  
juristic  
personality.

<sup>1</sup> Moreau, Clunet, 1892, p. 337; Desjardins, Clunet, 1893, p. 1009; Renault, ditto, p. 1118; Woeste and Le Jeune, ditto, pp. 1123 and 1126; Fleischlen, ditto, 1894, p. 282; Missir, ditto, p. 776; De Paepé, ditto, 1895, p. 31.

<sup>2</sup> See especially the Italian Commercial Code, Article 230.

power of an individual to satisfy by means of his unaided efforts. Public opinion now no longer considers that juristic personality is an artificial elaboration, with no relation to the practical necessities of life, to be granted as a special favour in rare instances. It has become an ordinary and necessary part of the mechanism, not only of commercial life, but of all social existence. Nor is it any longer regarded as naturally hostile and dangerous to the public welfare, but rather as an institution, subject to certain safeguards, of the greatest utility and benefit in enabling human beings to perfect and diversify their individual existences and social relations.

The most noteworthy effect of this change of opinion may be seen in the release of associations from the necessity of obtaining an express concession from the state as a condition precedent to the enjoyment of juristic personality, and as the only means of obtaining it. Formerly in all other European states, as in England, express authorisation was necessary to confer juristic personality on a group of individuals. Now many other countries have followed the example set by the English Joint Stock Companies Act of 1844, in substituting mere registration for express concession, so that juristic personality may be obtained by all, and is no longer confined to special cases expressly approved by the state. This privilege is in most countries still confined to those only who desire to combine for commercial purposes: but the necessary and beneficial nature of juristic personality finds its most remarkable recognition in the wide terms of the English statute, according to which registration confers the status of a corporation upon a company formed "for any lawful purpose<sup>1</sup>," and of the German enactment, according to which "a Society not formed for the purpose of carrying on any trade or business can acquire corporate rights by being entered on the register<sup>2</sup>."

Changes of this nature in public opinion and in the policy of legislatures have undoubtedly affected the opinions advocated by lawyers concerning the theoretical aspects of the subject. It must affect our opinion about the legal status of a foreign juristic person, whether we consider the juristic personality granted to it or assumed by it in its state of origin as an artificial privilege created by that state for some special purpose approved by it, or

<sup>1</sup> Companies (Consolidation) Act, 1908, § 2.

<sup>2</sup> German Civil Code, § 21.

as an inherent and naturally beneficent right of the individuals which compose it, which the state of origin has rather ratified than created. Accordingly, a change can be traced in legal theory from the extremely hostile and restrictive system of Laurent, based upon a conception of juristic personality as the artificial creation of some particular sovereignty, without any natural claim to recognition by any other sovereignty, to the liberal system of Fiore, Lainé, and others, based upon the conception of juristic personality as one of the necessary functions of natural personality, and having the same claim as a natural person to the possession of personal status abroad.

7. The subject is thus intimately connected with that of the nature of juristic personality in general: and the change of opinion in question has undoubtedly been caused in part at least by the new light which has been cast upon the latter by a school of German jurists, and in particular by Dr Gierke, who see in juristic personality a real thing, and not a fiction. The controversy between the 'Fiction' theory and the theories of the 'Realists' has a literature of its own. It would be impossible to consider it here in detail: nor is it necessary to do so, or to adopt any definite formula concerning the nature of juristic personality in general in order to arrive at some conclusion concerning the particular questions connected with the legal relations of foreign juristic persons. The latter depend rather on special and admitted rules of private international law, and of the law of persons in general, than on the metaphysical generalities concerning the nature of juristic personality. In dealing with foreign juristic persons we deal with legal facts and practical situations of the sort upon which generalisations concerning the fictitious or real nature of juristic persons must be founded. The answer to questions concerning the status of foreign juristic persons may cast light upon the nature of juristic personality in general: but to deduce the former from the latter would be to put the cart before the horse.

8. The same may be said of another controversy with which the present subject is intimately connected. All discussions about questions of private international law are, from one point of view, discussions concerning the extra-territorial force of laws. A juristic person is regulated, and, as some say, created by the laws of a particular

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of Private  
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state. The nature of its status and capacity in contemplation of a state other than that which regulated or created it, is related to the nature of the extra-territorial force of the laws of its state of origin. There is, it is well known, an historic controversy about the extra-territorial force of laws in general. According to the older theory of writers on the customs of the French Provinces, and in particular of Boullenois<sup>1</sup>, which was revived by Story in 1834<sup>2</sup>, and has been adopted in England as orthodox doctrine in numerous decisions and treatises, "it is a fundamental principle essential to the sovereignty of every independent state that no municipal law, whatever be its nature or object, should, *proprio vigore*, extend beyond the territory of that state by which it has been established<sup>3</sup>." It is recognised however that this strict principle is modified from motives of utility, and that certain laws are in fact effective beyond the boundaries of the state which enacted them: but this, it is said, is a mere matter of comity, or international courtesy. The foreign laws have no force of their own, but "in the silence of any positive rule, affirming, or denying, or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests<sup>4</sup>." Consequently any state is at liberty arbitrarily to restrict or extend the sphere of comity in whatever manner it pleases. But it is further recognised that in fact states do not exert their power of adopting or rejecting foreign laws in a purely capricious manner: but that there is an acknowledged rule amongst civilised nations as to the laws to which should be granted or denied an extra-territorial application. This is the historic "Statute" theory<sup>5</sup>, according to which "personal statutes," including all rules of law regulating the status and capacities of persons and the forms of acts, should be everywhere adopted and enforced as universally applicable to

<sup>1</sup> *Traité de la personnalité et de la réalité des lois*, obs. x., vol. 1., p. 4 (edit. Paris, 1766).

<sup>2</sup> Story, p. 21, pars. 18 and 38, followed by Kent and Livermore in America; in France by Foelix; and in Spain by Torres Campos.

<sup>3</sup> Burge, *Commentaries on Colonial and Foreign Laws* (1838), vol. 1., p. 1.

<sup>4</sup> Story, *Conflict of Laws*, 1st ed. (1834) § 37; also Foelix, *Droit International Privé*, 3rd ed., vol. 1., p. 22.

<sup>5</sup> "Statut, ce terme s'applique en général à toutes sortes de lois et de réglemens. Chaque disposition d'une loi est un statut qui permet, ordonne, ou défend quelque chose." Merlin, *Répertoire tit. Statut*.

the persons and acts in respect of which they were duly enacted, whilst the application of "real statutes," including, typically, rules of law affecting immoveables, and regulations of police, and of public order, should be confined to the territories of the state which enacted them.

On the other hand Savigny<sup>1</sup> and the school of German writers which has adopted and developed his doctrines<sup>2</sup>, contend that, in order to possess such unqualified territorial sovereignty as that claimed for all states in the preceding doctrine, a state would have to be without neighbours, that it would have to be a universal world-state. But, in fact, every state is surrounded by neighbours: and "in proportion as the relations between the diverse peoples increase in number and activity, it is necessary to convince oneself that one must renounce the exclusive principle and rather admit the contrary principle, *i.e.* that of a community of law between the different peoples<sup>3</sup>." All states are forced together into a great complex of law and trade, which necessitates a friendly recognition of each other's legal systems. This recognition must be extended by each state to such legal relations as, by their nature, belong to a foreign legal system rather than to the territorial system. Thus the extra-territorial force of any given law depends, not upon an arbitrary exercise of comity, but upon the nature of its subject matter; and laws dealing with such subjects as the status and capacities of persons derive their extra-territorial force, not so much from the foreign sovereign, as from necessities which proceed from the community of states and which the foreign sovereign is not at liberty to disregard<sup>4</sup>. From this it follows that the true test for deciding what laws have extra-territorial force is to be found, not in any traditional custom or in international courtesy, but in the nature of the laws themselves.

There is a difference of opinion amongst supporters of this doctrine about the feature in the nature of a law which is essential to the determination whether it ought to be allowed extra-territorial application or not. The German writers already

<sup>1</sup> Savigny, vol. VIII., § 361.

<sup>2</sup> Wächter, Schäffner, Puchta, Von Bar; and, in French, Laurent, Pillet, and others.

<sup>3</sup> Savigny, vol. VIII., § 348.

<sup>4</sup> See Von Bar, p. 2.

referred to contend that all laws have ex-territorial force except those which conflict with some local "prohibitive" law. In Italy Mancini has advanced and other writers have maintained<sup>1</sup> a theory that all laws ought to have extra-territorial force which concern only the private and particular national characteristics of the population and of the social organisation of the state which enacted them, amongst which must be numbered laws regulating the status and capacity of persons, but that they ought not to be allowed such force if they concern the general public order of the state. The former it is said should be admitted to universal validity, since every state should above all things respect the nationality of citizens of other states, and all the forms in which it may be expressed; whereas for the same reason the latter should be strictly confined to the territories of the state which enacted them, since to enforce them abroad would be to inflict injury on the national characteristics or the social organisation of foreign states. This doctrine has perhaps been stated most clearly by Fiore, in a series of propositions which may be summarised as follows: (a) States and nations ought to coexist harmoniously and juridically in the great society which is called the human race; but every state has the right to protect and maintain itself. (b) Since all schemes of positive legislation bear the stamp of the customs, traditions, and civilisation of the people, the laws of a state are applicable only to the subjects for whom they were specifically made. (c) Every sovereignty can exercise its rights beyond the limits of its own territory, provided that it does not injure the rights of other sovereignties; and the exercise of rights of sovereignty ceases to be legitimate when it interferes with the principles of public order, or the economical, political, moral, or religious interests of another state<sup>2</sup>.

Into these high matters of debate it will not be necessary to enter further here, except by way of reference. Although the doctrine of comity, as stated by Story, is perhaps orthodox amongst common lawyers, the more liberal system of Savigny has not been without influence upon our law<sup>3</sup>; and it will be seen that amongst English decisions there is but one which definitely

<sup>1</sup> Fusinato, *Laghi*.

<sup>2</sup> *Diritto Internazionale Privato*, 3rd ed., §§ 23, 24, 25, 26, 27.

<sup>3</sup> Cp. Westlake, Introduction; and Rattigan, *Private International Law*, chap. 1.

refers a question concerning the legal position of a foreign juristic person to the doctrine of comity, and that by a mere allusion, made *obiter*<sup>1</sup>. It is, therefore, not necessary to adopt either system in order to state the positive law of England concerning foreign juristic persons. Nor is it necessary to do so in order to deal with those problems involved in their juridical relations to which the positive law of England provides at present no solution. Here, as in the case of the controversy as to the nature of juristic personality in general, it would be unsafe to seek to answer the particular questions involved by means of a deduction drawn *a priori* from a general hypothesis. It is from the particular answers that the general hypothesis should be constructed.

9. For the solution of the problems to be considered materials are provided by the comparative study of positive municipal laws, and of the positive private international law which is contained in treaties. Unfortunately, as regards foreign juristic persons, the positive law of England contains but few definite authorities of this nature, and, in consequence, much ground is left to be covered by speculative reasoning supported only by a slight basis of fact. The sphere of abstract discussion is indeed reduced from time to time by new treaties and legislation concerning foreign commercial associations. But there are still many opportunities for theoretical treatment of the subject. Of these opportunities jurists have not made so much use in England as in other countries. The constant growth of the international activities of commercial associations, driven abroad by the denationalisation of capital and trade, has indeed from time to time forced English law to deal with foreign juristic persons. But it has developed in a characteristic manner. Leaving theories on one side, it has contented itself with establishing a number of rules of positive law, one for each of those events in the life of a foreign juristic person which commonly call for the intervention of the Courts. It has not concerned itself to trace any relations between its rules or to refer them to any general theory.

But amongst foreign jurists, vigorous controversies have, as it has been seen, long been carried on concerning both the

Materials for  
discussion of  
the subject.

<sup>1</sup> In *Bateman v. Service*, 1881, 6 H.L., p. 386.

fundamental principles of the subject and their proper application. Those of France, the chosen country of the science of private international law, have led the debate. Those of Belgium, Italy, and Germany have followed: and those of the United States have discussed the question under different circumstances in a different manner. From an English point of view such controversies are not all of equal interest. Some of them concern legal conditions which are unknown to our law. Certain arguments, for instance, concerning the status of a foreign *association, société, or Stiftung*, must lose their significance when repeated in a country where the only representative of the mighty *ordre publique* is the feeble public policy, where the difference between the civil and the commercial status is scarcely known, and where natural persons, the trustee and his *cestui que trust*, take the place of the *Stiftung*, which is mere personified purpose. The controversies, again, have been much influenced by political considerations of which we do not feel the stress in this country. The legal question of the status of a foreign juristic person is, in France and Belgium, necessarily connected with the political question of the position of religious associations; in Italy, with the position of the Holy See, and the patriotic doctrine of the preeminence of nationality as a standard of rights; in the United States, with the conflict between state rights and the Federal power. But when all local considerations have been eliminated from the theories proposed and the arguments by which they are supported, there remains a substratum of pure jurisprudence: certain lines of argument can be distinguished which claim to exhibit the true relations between the status and capacities of foreign juristic persons and those essential elements in the nature of a juristic person which are common to the juristic persons of all countries, and those principles of private international law the truth of which is universally admitted. In so far, therefore, as the arguments are sound, they are equally applicable and of equal importance to all civilised nations. They are of especial importance to English law, which provides so few positive authorities upon the subject. In the absence of Acts of Parliament and of authoritative decisions, the law of England must be ascertained by means of reference to general principles, to be elicited from "the judgments of foreign courts, the opinions



of distinguished jurists, and rules prevalent in other countries<sup>1</sup>." In the first part of this work an attempt is made in this manner to elicit and state certain general principles of universal validity. In the second part, the positive law of England is stated in so far as it has been ascertained by Acts of Parliament and authoritative decisions.

<sup>1</sup> Dicey, p. 23.

## CHAPTER II

### STATUS

1. "THE individual man," says Savigny, "clearly carries with him his claim to civil capacity in his corporeal appearance. By this appearance everyone else knows that he has to respect the personal rights of such a being, and every judge that he has to preserve them<sup>1</sup>." "Man," says Fiore, "considered as a member of the human race, has an individuality of his own, a sphere of action which includes all parts of the globe, a legal capacity belonging to him by reason of his very existence and independent of that which he has as the citizen of some state<sup>2</sup>." "Human individuality," says Brocher, "is the natural type of personality. In the abstract order of ideas, it exists before the law; the latter must recognise it and consider it as the centre of its activities<sup>3</sup>."

A natural person has a natural body which can pass from state to state and be recognised everywhere as a subject of rights. He has certain natural rights in all civilised countries, such as the right to safety of life and limb, apart from any special rights he may have as the citizen of some particular state and the possession of personal capacities conferred upon him by that

<sup>1</sup> Savigny, § 89.

<sup>2</sup> *Diritto Internazionale Codificato*, No. 317. See also Fiore, § 302. It has been said that this doctrine is ethical rather than juridical, since individuals are not the subjects of rights in the law of nations. See Oppenheim, *International Law*, vol. I., § 292, and authorities there cited. Such criticism is not relevant to the present discussion, in which it is immaterial whether the natural capacity referred to consists of a single phenomenon of the law of nations, or of a number of similar phenomena of various municipal laws.

<sup>3</sup> Brocher, chap. 1, No. 26.

state. At one time no doubt this was not so, and the status of a foreigner was no better than that of an outlaw, but with the progress of civilisation it has been firmly established that every natural person has a natural right to be recognised as having personal status in every state. He is entitled to it by reason of his natural existence. It is conditioned by his sex, age, sanity, family relations, and sometimes also by his religion.

2. Can this principle be extended so as to include juristic persons? When a juristic person has obtained the status of legal personality in the state of its origin, and is there regarded as a person and the subject of rights, Can a juristic person have status in P. I. L. has it for that reason alone the right to be regarded as a legal person and the subject of rights in all other states? It may be said that the question is meaningless unless it be referred for answer to some positive law; that it must be answered by each state according to its own rules; and that in the absence of any such rules there are no materials by means of which it can be answered. But this is too narrow a view. The true legal explanations of many of the circumstances and conditions of juristic persons, and of the position of persons in general, in private international law, stand upon a basis which is reasonable and not arbitrary in its nature, and they are in consequence already embodied in much the same form, or tend to become so embodied, in all systems of positive law alike. Even in the absence, therefore, of any rules of positive law in some particular state, the question may still be put and an attempt, at least, may be made to answer it for the law of that state by means of these reasonable explanations. Several such attempts have in fact been made, and several varieties of opinion expressed as to the true solution of the problem. They submit to a simple general classification. The question stated above may be answered in the negative, and a system adopted which restricts foreign juristic persons, by denying to them a natural right to be recognised as persons by states other than their state of origin; or it may be answered in the affirmative, and a system adopted which is liberal towards foreign juristic persons in admitting them to that right. According to the restrictive system, a foreign juristic person is entitled to no personal status: according to the liberal system it is entitled, subject to certain special differences, to the same personal status as a natural person, and for the same

reasons. The former system preceded the latter historically : in the first place the difficulties of an affirmative answer to the principal question were realised, and subsequently means were suggested of overcoming them or explaining them away. It will be most convenient to consider the earlier system first, although it now obtains little support.

### The Restrictive System.

3. In legal systems derived from Roman Law the orthodox doctrine as to the nature of juristic personality is that it is a mere creature of some sovereign authority, having no other existence than a fictitious one which the law concedes to it. According to these systems there is no natural analogy between a juristic and a natural person. The latter has a natural existence, and therefore natural rights. The former, it is argued, has no natural existence and therefore no natural rights<sup>1</sup>. Having no birth-place and no birth, it can have neither *jus sanguinis* nor *jus soli*. It has neither sex, age, state of mind, family relations, nor religion ; and so it cannot have personal status, which is based upon those circumstances. Not only has it no claim to be recognised as a person in states other than its state of origin, but it is even incapable of being so recognised. Since it exists only as the fiction of some particular municipal law, where the law which feigns it has no authority and is not operative it cannot exist. Such opinions have been so vigorously maintained by the eminent Belgian jurist Laurent, and have become so much identified with his forms of expression, that they should be stated in his own words :

“ Before deciding in absolute terms,” he writes, “ that corporations have the same rights abroad as individuals, it is necessary to consider if they exist outside the limits of the territory where they have been created. It seems evident to us, however, that they do not : a result which follows from the very nature of incorporation. The legislature alone has power to create juristic persons ; its power, however, ceases at the limits of the territory of the nation which has delegated to it legislative power ; beyond these limits it exercises no authority ; therefore the corporations, which have no existence except by its will, do not exist in any

Systems deny-  
ing status to a  
juristic person  
in P. I. L.  
(a) Laurent.

<sup>1</sup> Cp. Weiss, § 11, p. 396 ; and Ricard, Clunet, 1881, part 2, p. 477, note 1.

place where that will is without force and without effect. The corporation has its existence from the law, and the law can recognise it only within the limits of the territory over which it exercises dominion; the legislature cannot, if it would, give it a universal existence, for this universal existence, and the fiction, implies the recognition of the legislature. In order that there might be a universal fiction, there would have to be a universal legislature. A universal fiction created by a local legislature is an impossibility; therefore to speak of juristic persons existing everywhere and exercising their rights everywhere, is a heresy<sup>1</sup>. The same reasoning has been adopted by the French *Cour de Cassation*. "A joint stock company," it was said by that Court, "is only a fiction of the law, it exists only by it, and has no other rights than those which are conferred upon it: law, which derives its power from some sovereignty, has empire within the limits of the territory only over which that sovereignty is exercised; it follows from this that the foreign joint stock company, however regularly it may be constituted in the country in which it was founded, can only have existence in France by the effect of the French law (*i.e.* of Joint Stock Companies), after submitting itself to its prescriptions. It is vainly objected that a stranger's personal statute follows him into France, and that because of this no distinction should be made as regards laws which rule the capacities of juristic persons; in fact, in distinction from juristic persons, natural persons have an existence of their own, and one must not confuse, as to the (extra-territorial) force which they can have, laws which create a person and give it existence, and

<sup>1</sup> Laurent, vol. IV., § 119; cp. also Aubry and Rau, *Cours de Droit Civil Français*, 5th ed., vol. I., § 54, p. 276; Calvo, vol. II., p. 229. Mancini, the father of the Italian school of private international law, also follows Laurent. "The natural person exists independently of the law which regulates its status and capacity, and therefore enjoys abroad natural rights—whereas on the other hand the juristic person does not exist really and naturally, it owes its life to a fiction, and to an act of will of the political authority—and therefore it has no existence and can have no rights beyond the limits of the territory of the sovereignty which attributes to it an artificial life. It would be absurd that the legislature should seek to confer universal existence upon a national society. It could not if it wished because its authority does not extend over the whole human race."

*Relazione sul nuovo codice di commercio*, p. 462; and cp. Pierantoni, *Sulla capacità delle persone giuridiche straniere*, *Rassegna Commerciale*, II., pp. 1—29; Bianchi, *Corso di diritto civile*, 1886, *Delle persone*, No. 4, p. 4; modifying his views expressed in *Elementi di diritto civile*, vol. I., § 218.

those which do no more than regulate its rights and determine the conditions of its existence<sup>1</sup>."

The same theory is accepted, and was indeed first formulated in the United States, where it is generally stated in a manner more pictorial, and perhaps less scientific. It is said in the first place "that invisible, intangible, and artificial being, that mere legal entity, a company aggregate, is certainly not a citizen<sup>2</sup>." From this the conclusion is drawn that "it is very true that a company can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in the contemplation of law, and by force of the law, and where that law ceases to operate, and is no longer obligatory, the Company can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty<sup>3</sup>." "The Company being the mere creature of local law, can have no existence beyond the limits of the sovereignty which created it<sup>4</sup>." In this form the theory is still repeated and accepted by American judges<sup>5</sup> and authors<sup>6</sup> as part of the law of the United States.

The argument that juristic persons are not entitled to be recognised as persons outside their state of origin, based upon the theory that their personality is a fiction and created by the law, is thus stated in two ways. On the one hand, it is said that a legal fiction cannot exist apart from the law which feigns it: and on the other, that an entity which is created by the law has no claims to rights for which the essential qualification is a natural existence. So far there is agreement amongst the supporters of this system, and particularly amongst those in the United States and France. But there is not the same agreement as to the consequences of the principle. The most logical and complete development of the system, and the most hostile and restrictive towards the foreign juristic person, is that of Laurent<sup>7</sup>, which may be stated and developed as follows.

<sup>1</sup> Dalloz, 1860, I., 444; cp. also Dalloz, 1860, II., 126; Pasicrasie Belge, 1849, I., 221.

<sup>2</sup> per Marshall, C. J., *Bank of U.S. v. Deveaux* (1809), 5 Cranch. Am. Rep. 61.

<sup>3</sup> per Taney, C. J., *Bank of Augusta v. Earle* (1839), 13 Peters 519; cp. also *Runyan v. Lessee of Coster* (1840), 14 Pet. at p. 129; *Ohio and Mississippi Railway Co. v. Wheeler* (1861), 1 Black 286.

<sup>4</sup> per Field, J., *Paul v. Virginia* (1868), 8 Wallace 168.

<sup>5</sup> See *Waters-Pierce Oil Co. v. Texas* (1899), 177 U.S. Rep. at p. 44.

<sup>6</sup> See Dudley Field, *Outlines of an International Code*, 2nd ed., § 545.

<sup>7</sup> Laurent, vol. IV., § 72 et seq.; and Laurent, *Précis de Droit Civil*, vol. I., No. 287.

*An Express Recognition or Authorisation by the State is necessary to confer personal status on a foreign juristic person.*

4. Since a juristic person exists only in so far as it has an existence conceded to it and is thenceforward contemplated as existing by some local law, to confer upon it existence in a state other than its state of origin an express act of the foreign sovereign authority is necessary. "In the absence," says Laurent, "of a legislature whose power extends over all nations, the fiction which one legislature creates must be adopted by the others; a fiction created by the law of one country is non-existent in another until it has been recognised there<sup>1</sup>." Before it can be admitted to possess personal status, a foreign juristic person must in every case obtain an express recognition from the local sovereignty. The recognition may take the form of special authorisation of each particular juristic person<sup>2</sup> or of a statute<sup>3</sup>, or when treaties have the force of law, of a treaty<sup>4</sup> specially recognising some class of juristic person, with or without the imposition of formalities as a condition of the recognition; but in any case some express exercise of the sovereign authority is necessary<sup>5</sup>.

This conclusion is supported by other considerations, derived from general principles of private international law as to the difference between rules of law which are of territorial application only, and those which have extra-territorial force; or in the terms of the statute theory, between those statutes which are personal, and those which are real. As to this, there is a general agreement that whatever doubts there may be as to other sorts of rules of law, rules which relate to the social interests or public order of a state can have no extra-territorial force. They are

<sup>1</sup> Laurent, vol. IV., No. 119.

<sup>2</sup> *e.g.* The official authorisation necessary for Joint Stock Companies in Russia under the Imperial Decree of 9th Nov. 1887.

<sup>3</sup> *e.g.* The Belgian law of 1873, regulating foreign commercial associations.

<sup>4</sup> *e.g.* The German-Italian treaty of 8th Aug. 1873 for the mutual recognition of Joint Stock Companies.

<sup>5</sup> Laurent, vol. IV., § 129, p. 255; Weiss, p. 397; and Weiss, "L'Affaire Zappa, Consultation pour le Gouvernement Royal Hellénique," *Archives Diplomatiques*, 1893, part 4, p. 132.

pre-eminently "real statutes," and must be confined to a strictly territorial application. To admit them to a more extended application would be to permit the state which enacted them to interfere with the social interests or public order of the state in which they were applied, and thus infringe the legitimate sovereignty of the latter<sup>1</sup>. The same principle may be stated in terms of the common law by saying that there is the strongest possible public policy against the enforcement of such rules of law elsewhere than in the particular state which enacted them; and amidst numerous instances of its application by English courts may be mentioned their refusal to recognise the servile status of one who is legally a slave by the law of his domicile, because that status is not part of the social organisation based upon the laws of England. A state is itself the only proper judge of its own needs. Its social necessities and interests can be rightly appreciated by itself alone, and not by other states. Even where the interest in question is, in a way, common to all mankind, such as that of education, yet each state must administer it according to the special circumstances of its own population.

Now the promotion of some social interest or necessity is a consideration which is present in every concession of juristic personality and without some such motive there would be no concession<sup>2</sup>. It involves a devolution of part of the power of the state, and the resulting person exists and operates as part of the social organisation of the state. It follows therefore that the exercise of the sovereign authority of a state, the "statute" by which a juristic person is created and maintained in existence, belongs to that class which is effective only within the territories of the state which enacted it, and cannot be admitted to take effect within the territories of any other state without interfering with the social interests and public order of the latter. In other words, such an admission must necessarily be contrary to the public policy of the latter. The only manner in which the foreign juristic person can surmount this obstacle is, as before, by obtaining an express recognition from the local sovereign power. A state is itself the only proper judge of its own social

<sup>1</sup> Laurent, vol. IV., pp. 232, 240; Calvo, vol. II., § 743; *Cour Cass. Belg.*, Pasicrasie, 1849, vol. I., p. 221.

<sup>2</sup> Laurent, vol. IV., § 80, pp. 173, 240; Weiss, vol. II., 390.



interests and it is open to it to say that the functions which a foreign juristic person proposes to discharge within its territories will not injure those interests and will be consistent with its public policy ; and thus to adopt the foreign juristic person as a part of its own social organisation. But until it has done so, the social organisation which it has established must not be interfered with from outside.

As in the case of the reasoning based upon the fictitious nature of juristic personality, so in the case of this reasoning based upon its public or social nature, the argument can be so stated as to lead to the conclusion not only that a foreign juristic person has no claim to personal status, but that it is even incapable of possessing it until it has obtained an express recognition. In this connection it is necessary to consider another of the essential qualities of juristic personality. In England we know that a statutory corporation created for a particular purpose is limited as to all its powers by the purposes for which it was incorporated<sup>1</sup>. We know further that the special powers given to any corporation are always subject to an inherent restriction that they are to be exercised in subjection to the purposes of the corporation, and that this "is not a mere canon of English municipal law, but a great and broad principle which must be taken as part of any system of jurisprudence<sup>2</sup>." Similarly French lawyers are familiar with a doctrine of *spécialité des attributions dévolues* limiting the powers of public juristic persons to the purposes for which they were created. In general, it is an essential characteristic of all juristic persons that they have only those capacities which are necessary in order to enable them to fulfil the purposes for which they were created. Indeed this is a characteristic of all personality, natural and juristic alike. The capacities of a natural person also are a function of his purpose in life. "The part," it has been well said, "which has to be played by each man living in society is the cause and in consequence the measure of his rights<sup>3</sup>." The juristic person differs from the natural person in this respect only in having its

<sup>1</sup> Riche v. Ashbury Railway Carriage Company (1875), L.R. 7 H.L. at p. 693.

<sup>2</sup> Pickering v. Stephenson (1872), L.R. 14 Eq. 322 ; and see Laurent, vol. IV., § 117 ; Kent's *Commentaries*, 12th ed., vol. II., p. 353, and pp. 385—387.

<sup>3</sup> Moreau, p. 337.

purposes fixed once and for all at its first constitution. Thenceforward every action that it performs must be directed towards the accomplishment of those purposes and it can perform no act that does not contribute to that end. Now the whole objective existence of a juristic person consists only of its capacities<sup>1</sup>. Its actions alone render its existence sensible, and without power to act it is a mere nonentity. To deprive it of its capacities would be to deprive it of existence; and since its purpose is the measure of its capacities, to deprive it of its purpose would be to deprive it of its capacities. It follows that to deprive it of its purpose would be to deprive it of its existence.

But, as has already been said, the purpose of a juristic person concerns the social interests and public order of the state which created it. It cannot unless it has obtained an express recognition, discharge its functions in other states, because by doing so it would interfere with their social interests or public order, and such an interference would amount to a breach of the sovereignty of the latter states by the former. Beyond the limits of the territory of the state which created it a juristic person can, therefore, have no purpose to fulfil, and having no purpose to fulfil, it can have no existence<sup>2</sup>.

5. This reasoning has been stated and maintained by its adherents for a more limited purpose than that for which it has been utilised here. By them it has been advanced to prove that a particular class of juristic persons, states and their sub-divisions or derivative juristic persons, such as local administrative bodies and municipal corporations, are incapable of exercising a particular capacity abroad, that of possessing real estate. The argument indeed is more immediately applicable to that class of juristic person than to others, for it can be argued with special force that a state, considered as a juristic person in private international law, and not as a person in public international law, can have no purpose to fulfil beyond the limits of its own territory. The object of the existence of its juristic personality is to assist it to carry on the business of government, an object it cannot accomplish

<sup>1</sup> Laurent, vol. IV., § 151, p. 290, "L'existence d'un Corporation et ses droits se confondent."

<sup>2</sup> Cp. Mamelok, p. 69; also Moreau, p. 337.

abroad without a direct infringement of the sovereignty of some other state. But there can be no good logical reason for limiting the argument to a single class of juristic person, or to a single sort of capacity. If it is valid to deprive juristic persons of one sort of capacity, it is equally valid to deprive them of all capacities alike, and so of their very existence. There is no distinction, as regards that element in their nature upon which stress is laid in this connection, between the state and other juristic persons. The purposes of all alike involve social interests and necessities in just the same manner, although in different degrees.

All such reasoning based upon the considerations that social interests or public order are involved in the creation of juristic persons applies specially to non-commercial associations, which are created for some educational, charitable, religious, or political object, or any other object of a social character. Such associations having something of a public position may reasonably be said to be part of the social organisation, and thus to relate to interests which each state must appreciate for itself: and the same is true of those juristic persons which are mere personified purpose without any natural persons as members (the *fondation* and the *Stiftung*) and which in continental systems of law fulfil many of the functions which are here fulfilled by the trustee and his trust. But it applies with far less force to commercial associations, whose only object in existence is that of private gain. The latter are associations rather of capital than of men, and, the nature of capital being more cosmopolitan than national, have little connection with the social organisation of any state in particular. Their purposes are private and not public. It might indeed be said that in so far as they form a part of the commercial organisation of a state, they relate to a branch of its social organisation; but the promotion of international commerce being an interest of all states alike is encouraged in all states alike and is against the policy of none, and the existence of a right of international commerce is recognised in public international law. The reasoning must therefore almost entirely fail in its force when applied to commercial associations; and some distinction ought to be made between them and other juristic persons. Distinctions of this nature are unfamiliar to the common law. In the United Kingdom a limited company

can be formed "for any lawful purpose"<sup>1</sup>: and companies are in fact commonly incorporated in a commercial form for purposes of a characteristically public nature, to keep schools, to establish religious missions, or for the advancement of science and art. Such distinctions as there are between commercial and uncommercial companies are slight and technical<sup>2</sup>; and no distinction is made as regards their general status. It is clear therefore that a theory which finds it necessary to differentiate between them must be laying stress upon an element in their nature on which the common law lays no stress. It is not congenial to the common law. But in continental systems of law it is natural to make such a distinction. Where *ordre publique* holds sway; where all laws are divided into public and private laws; and where stress is laid upon the difference between the civil and the commercial status, it is natural to look upon public juristic persons as sharply distinguished from private juristic persons, and to formulate different theories for the two classes. Accordingly we find it universally maintained by continental authorities that commercial associations require special and favourable consideration. Even the supporters of the restrictive system admit that some relaxation of its severity is admissible and necessary in their case: but the relaxation admitted amounts to no more than this, that inasmuch as they are not closely related to any social organisation and do not concern public order, they ought not to be viewed with suspicion by foreign states, but should be freely recognised and admitted to the possession of personal status<sup>3</sup>. The relaxation does not extend to relieve them from the necessity of obtaining an express recognition. Their personality shares the common characteristic of all juristic personality. It is pure fiction, and cannot therefore, any more than the personality of a public juristic person, obtain personal status abroad until it has been admitted to it by the local sovereign authority. Commercial associations are in fact condemned together with public juristic persons, and distinguished from the latter only in being recommended to mercy.

<sup>1</sup> Companies (Consolidation) Act, 1908, § 2.

<sup>2</sup> Such as the power to dispense with the word "Limited" in the name of a charitable company. Companies (Consolidation) Act, 1908, § 20.

<sup>3</sup> Laurent, vol. IV., § 154, p. 293.

6. Summarising the preceding contentions we see that the case against foreign juristic persons in its most restrictive form may be stated as follows.

Summary  
of the  
Restrictive  
System.

(1) Foreign juristic persons are not entitled to possess and are not capable of possessing personal status, because:—

(a) Juristic persons are the fictions of territorial law, and cannot exist where that law has no authority.

(b) Foreign natural persons are entitled to personal status in virtue of this natural existence only, and juristic persons have no natural existence.

(c) The legal act creating a juristic person concerns social interests or public order, and can therefore have no extra-territorial force.

(d) A juristic person exists only in its capacities and has only such capacities as are necessary to enable it to fulfil its purpose. Since its purpose concerns social interests or public order it cannot fulfil it abroad, and therefore it can have there no capacities, and so no existence.

(2) Therefore express recognition by the local sovereign authority is necessary in order to entitle and enable foreign juristic persons to possess personal status.

(3) Such recognition should not be denied to commercial associations.

7. To the lawyers of the United States we owe a theory which, while it accepts the fundamental proposition of the

Comity and  
Implied  
Recognition.

restrictive system, manages nevertheless to draw from it conclusions the reverse of those just stated, and to enable foreign juristic persons to claim a personal status as of right outside their state of origin, without the necessity for any express recognition.

### *Comity and Implied Recognition.*

Before stating this theory, it is necessary to deal briefly with the circumstances, both legal and historical, under which it was evolved. The states of the Union are independent

(a) Develop-  
ment of the  
Theory of  
Comity.

sovereignities, except in so far as their sovereign rights are qualified by the Federal constitution. The corporations of each state are therefore foreign corporations in every other state, except in so far as there may be provisions of the Constitution of the United States which give them rights

outside their state of origin. It has been decided that corporations are not citizens<sup>1</sup> and that in consequence the provisions of article IV. § 2, clause 1 of the Constitution of the United States, that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" do not apply to them<sup>2</sup>. It has also been decided that corporations, although they are "persons" within the meaning of the first section of the 14th Amendment to the Constitution, which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws," yet are not entitled by that section to claim any rights outside their state of origin, but only to claim "equal protection" after such rights have been conceded to them and they have thus come within the jurisdiction of the foreign state<sup>3</sup>. It appears, in fact, that the only provision of the Constitution which qualifies the sovereignty of the several states in respect of corporations is article I. § 8, clause 3, the effect of which is to reserve to Congress control over corporations engaged in foreign or interstate commerce, and of corporations in the employ of the Federal government. All other corporations, being totally unaffected by the Federal constitution, are related to the laws of their state of origin only, and are foreign corporations in every other state. This being so, the practical necessities of business would have made it extremely inconvenient to adopt the restrictive system in the severely exclusive form in which it has been stated above; and yet the theoretical basis of that system was acknowledged to be correct. As has been seen, American lawyers were able to come to no other conclusion than that a "corporation, being a mere creature of local law, can have no existence beyond the limits of the sovereignty which created it<sup>4</sup>," and American law affords several instances of the practical application of this theory in all its logical severity. The first instance is in connection with adopted and consolidated corporations. In the United States corporations are not infrequently "adopted" as domestic corporations by the

<sup>1</sup> Except for the special purpose of establishing jurisdiction in a Federal court. *Blake v. McLung* (1898), 172 U.S. Rep. at p. 259.

<sup>2</sup> *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania* (1888), 125 U.S. Rep., p. 181; following *Paul v. Virginia* (*sup.*). Also *Warren Manufacturing Co. v. Etna Insurance Co.* (1836), 2 Paine, p. 502; *Blake v. McLung* (*sup.*), and *Attorney General v. Electric Storage Battery Co.* (1905), 188 Mass., p. 239.

<sup>3</sup> See cases in notes 1 and 2, p. 118; and *Southern Railway Co. v. Greene* (1909), 216 U.S. Rep., p. 400.

<sup>4</sup> *Bank of Augusta v. Earle* (*sup.*).

legislature of a state other than their state of origin; or existing corporations of different states are consolidated by the co-operating legislatures of those states. To all appearances the adopted corporation remains a single corporation and does not become several; and the consolidated corporations do not remain several, but become single. But it has been realised that on the strict basis of the fiction theory, such unity is technically impossible, and that the theory demands that the adopted or consolidated corporation should be considered as having as many personalities as there are states co-operating to bestow personality upon it. Since the personality of a corporation is a fiction of law and a law has no force outside the territories of the state which enacted it, a corporation endowed with the capacities and faculties which it possesses by the co-operating legislation of two states cannot have one and the same legal being in both states. Neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised<sup>1</sup>. Even though the corporation is apparently single, possessing the same powers, duties, franchises, and purposes, and composed of the same natural persons, in both states, it must be treated as two separate and distinct corporations of the respective states, and not as one corporation existing in both states<sup>2</sup>. Two states cannot fuse themselves into a single sovereignty and, as such, create a corporation which shall be a corporation of the two states without being a corporation of each state or of either state<sup>3</sup>. Consequently in practice a consolidated corporation is treated as a domestic corporation in each of the states which co-operate to bestow personality upon it for the purposes of jurisdiction<sup>4</sup>, taxation<sup>5</sup>, local regulation<sup>6</sup>, service of

<sup>1</sup> *Ohio and Mississippi Railway Co. v. Wheeler* (1861), 1 Black, p. 286.

<sup>2</sup> *Rece v. N.N. and M.V. Co.* (1889), 32 W. Va. at p. 172. Also *State of Maryland v. The Northern Central Railway Co.* (1861), 18 Md. at p. 213. Whether by a particular statute a state intended to make a domestic corporation out of a foreign corporation, or only to confer privileges upon a foreign corporation, is a question of interpretation. *Railroad Co. v. Harris* (1870), 12 Wall., p. 65; *James v. St Louis and S.F. Railway Co.* (1891), 46 Fed. Rep., p. 47.

<sup>3</sup> *Quincy Bridge Co. v. Adams Co.* (1878), 88 Ill., p. 615.

<sup>4</sup> *Burger v. Grand Rapids and I.R. Co.* (1884), 22 Fed. Rep., p. 561; *Muller v. Dows* (1876), 94 U.S. Rep., p. 444; *Colglazier v. Louisville &c. Railway Co.* (1884), 22 Fed. Rep., p. 568.

<sup>5</sup> *Quincy Bridge Co. v. Adams Co.* (*sup.*).

<sup>6</sup> *Stone v. Farmers' Loan and Trust Co.* (1886), 116 U.S. Rep., p. 307; *Peik v. Chicago &c. Railway Co.* (1876), 94 U.S. Rep., p. 164.

process<sup>1</sup>, seizure of its shares on execution or attachment<sup>2</sup>, exercise of right of eminent domain<sup>3</sup>, and a decree of dissolution<sup>4</sup> which dissolves only the domestic personality, and does not affect what it is difficult to avoid calling the other personalities of the corporation.

Another instance is to be found in the limitations placed upon the power of corporations to perform abroad acts which are the acts of the corporation itself, and not of its agents. The corporate faculty, it is said, cannot accompany the natural persons who possess it beyond the bounds of the sovereignty which confers it, and it follows that all votes or proceedings of persons professing to act as corporations when assembled without the bounds of the sovereignty granting the charter, are wholly void<sup>5</sup>.

In these matters strict adherence to the fiction theory has led to no special practical inconvenience: but it would be otherwise as regards the question of the status of foreign corporations in general. It would clearly be most inconvenient if a Montana Banking Co., for instance, were unable to purchase a bill in Alabama without undergoing some cumbrous process of recognition. A solution of the difficulty was found in Story's theory of comity. Enunciated shortly before the decision in *Bank of Augusta v. Earle*<sup>6</sup>, in which such matters were first fully discussed, it formed the basis of that decision and determined the course of development of American opinion from its outset. All laws, it is said, are of territorial application only, but unless they are repugnant to the policy or prejudicial to the interests of a foreign state, they are tacitly adopted and applied abroad out of international courtesy or comity. In so applying them there is no infringement of sovereignty, for the application is purely voluntary and the courtesy "is established not only from motives of respect for the laws and institutions of foreign countries, but from considerations of mutual utility and advantage<sup>7</sup>." Nor in applying comity do the courts infringe upon

<sup>1</sup> *In re St Paul and N.P. Railway Co.* (1886), 36 Minn., p. 85.

<sup>2</sup> *Young v. South Tredegar I. Co.* (1886), 4 Am. St Rep., p. 752.

<sup>3</sup> *Toledo &c. Railway Co. v. Dunlop* (1881), 47 Mich., p. 457.

<sup>4</sup> *Hart v. Boston &c. Railway Co.* (1873), 40 Conn., p. 524.

<sup>5</sup> *Miller v. Ewer*, 27 Me., p. 518; s.c. 46 Am. Dec., p. 621.

<sup>6</sup> Story, 1st ed., 1834.

<sup>7</sup> *Hoyt v. Thompson* (1851), 5 N.Y. at p. 340.



the powers of the legislature, because the comity exercised is not that of the courts themselves but of the state, and is therefore law and not a judge-made substitute for law. "The rules of comity are subject to local modification by the law-making power; but until so modified, they have the controlling force of legal obligation<sup>1</sup>." The applicability of comity is to be presumed in a given case from the silent acquiescence of the state. Whenever a state sufficiently indicates that a legal relation which derives its validity from comity is repugnant to its policy, or injurious to its interests, the presumption in favour of its adoption can no longer be made<sup>2</sup>. But the question must be determined by the state and not by the courts. A sovereignty must designate its own line of policy, and courts must not forestall its decision, and say, in advance of the legislature, what its interests and policy demand. Such a course would savour more of a legislative than of a judicial interpretation. Courts must take the laws and policies of the state as they find them in its statutes<sup>3</sup>. If any direct enactment is found, the courts must obey it, and in its absence they must determine the question of the acceptance or rejection of a foreign legal relation with reference to general legislation and the surrounding circumstances such as the economic needs of the country, *e.g.* the position of the United States "as a great and growing community having need of and employing large amounts of combined capital<sup>4</sup>."

These, then, are the principles to be applied in determining the status of a foreign juristic person. Out of comity there is fashioned for them a right of recognition based upon implied consent<sup>5</sup>. Unless the state has made it plain in its legislation that the recognition of foreign juristic persons, or of some particular class of them, is contrary to its policy or interests, the laws of the state of origin of foreign juristic persons which relate to their creation are to be

(b) Application of the Theory of Comity.

<sup>1</sup> Merrick v. Brainard (1866), 34 N.Y., p. 208.

<sup>2</sup> Paul v. Virginia (1868), 8 Wall., p. 168; Liverpool Insurance Co. v. Massachusetts (1870), 10 Wall., p. 566.

<sup>3</sup> Bank of Augusta v. Earle (*sup.*) at pp. 592—594.

<sup>4</sup> Demarest v. Flack (1891), 128 N.Y. at p. 214. Also Christian Union v. Yount (1879), 101 U.S. Rep., p. 352.

<sup>5</sup> People of State of N.Y. v. Fire Assurance of Philadelphia (1883), 92 N.Y. at p. 324; and *cp.* Chapman v. Hallwood Cash Register Co. (1903), Texas Civil App., 73 S.W., p. 969.

treated as the objects of comity as much as any other laws of that state. It is to be presumed that they are tacitly adopted; and the foreign juristic person will thus obtain personal status by means of an implied recognition. Once it has obtained the status of personality in its state of origin it will receive simultaneously a similar status in every other state. "It is but the usual comity of recognising the law of another state<sup>1</sup>," just as foreign law is recognised in respect of the forms of acts, for instance, or property in immoveables. No express recognition is necessary. On the contrary, an affirmatively expressed intention not to recognise foreign corporations must be manifested by the state in order to deprive the foreign corporation of the implied recognition based on comity. "Where a state does not forbid, or its public policy, as evidenced by its statutes, is not infringed, a foreign corporation may transact business within its boundaries and be entitled to the protection of its laws. But this right is still founded upon consent which is implied from comity and absence of prohibition<sup>2</sup>." The absence of any regulation by the legislature of the position of foreign juristic persons in general<sup>3</sup>, or of any provision for the formation of companies similar in type to that which seeks recognition<sup>4</sup>, gives rise to no presumption of a public policy hostile to the foreign corporation and forms no reason for the court to refuse to recognise it.

At the same time, comity is not compulsion. It is not required to be more than equal and reciprocal, and "what is wholly matter of privilege may be granted or withheld upon conditions<sup>5</sup>." When the interest or policy of any state require it to abolish or restrict the rule of recognition by comity, it has but to declare its will by the legislature, and the legal presumption of recognition is forthwith abolished or restricted accordingly<sup>6</sup>.

A foreign corporation "having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts on their assent, it follows, as a

<sup>1</sup> *Bank of Augusta v. Earle (sup.)* at p. 589; also *Bank of Kentucky v. Schuylkill Bank* (1846), *Pars. Sel. Cas.*, vol. I., at p. 225.

<sup>2</sup> *People of State of N.Y. v. Fire Assurance of Pa. (sup.)*; also *Bard v. Poole* (1855), 12 N.Y., p. 495.

<sup>3</sup> *Demarest v. Flack (sup.)*.

<sup>4</sup> *Cowell v. Springs Co.* (1879), 100 U.S. Rep. at p. 59; *State v. Cumberland Telephone Co.* (1905), 114 Tenn., p. 194; see also *Foelix*, pp. 31, 64.

<sup>5</sup> *People of State of N.Y. v. Fire Assurance of Pa. (sup.)*.

<sup>6</sup> *Demarest v. Flack (sup.)*.

matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely: they may restrict its business to particular localities. The whole matter rests in their discretion<sup>1</sup>." A corporation created by one state can carry on business in another only with the consent express or implied of the latter state: and this consent may be accompanied by such conditions as the latter may think fit to impose; and "these conditions must be deemed valid and effectual by other states if not inconsistent with the rules of public law which secure the jurisdiction and authority of each state from incroachment by all others, on that principle of natural justice which forbids condemnation without opportunity for defence<sup>2</sup>. The state may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law<sup>3</sup>." In the absence of any express denial or restriction, however, no presumption is to be made of any general policy in the state hostile to foreign corporations. They "are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They do not carry a black flag, and the policy of all civilised nations is to grant them recognition in the courts<sup>4</sup>."

The lawyers of the United States cut the Gordian knot of fiction with the sword of comity: and thus overcame those difficulties of the situation which are due to the theory that juristic personality is created by law. With the other difficulties upon which Laurent laid stress they have not concerned themselves. They are not difficulties which present themselves naturally to the minds of common lawyers, or to those who are chiefly occupied with commercial corporations only. The common law makes no distinction between public and private law

<sup>1</sup> *Paul v. Virginia (sup.)*; *St Clair v. Cox* (1882), 106 U.S. Rep. at p. 356; *St Mary's Petroleum Co. v. West Virginia* (1905), 203 U.S. Rep., p. 183.

<sup>2</sup> *Lafayette Insurance Co. v. French* (1855), 18 How. at p. 407; also *Commonwealth v. N.Y., L.E., and W.R. Co.* (1889), 129 Pa., p. 463. A state may withdraw permission to carry on business, as well as refuse it. *Hammond Packing Co. v. Arkansas* (1908), 212 U.S. Rep., p. 322.

<sup>3</sup> *Attorney General v. Bay State Mining Co.* (1868), 99 Mass., p. 148.

<sup>4</sup> *Demarest v. Flack (sup.)*; and see generally *Thompson*, § 7881; and *Morawetz*, § 960.

and knows no doctrine of *ordre publique*, and commercial corporations have no intimate relation to the social organisation of a state. It is not surprising therefore to find that Laurent's arguments based on these features of juristic personality have found no echo in the United States; and that American lawyers have not been troubled by the thought that the natural characteristics of corporations might give rise to a public policy against the implied recognition of foreign juristic persons.

8. The theory of recognition by comity is frequently supplemented in American decisions and elsewhere by another argument in favour of the enjoyment by foreign juristic persons of a right to personal status, in spite of their being mere creatures of local law, and having no existence beyond the limits of the sovereignty which created them. The idea of agency is called in to the assistance of comity. "Natural persons through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract, within the scope of its limited power, in a sovereignty in which it does not reside<sup>1</sup>?" "A company cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere<sup>2</sup>." According to this theory, the personality of the foreign juristic person never comes into jeopardy. It preserves itself by staying at home, while it sends its agent abroad<sup>3</sup>, who can transact business for it, and in case of need accept service of process<sup>4</sup>.

9. The American doctrine may be summarised as follows:

(1) Foreign juristic persons are not entitled to possess or capable of possessing personal status on the same footing as natural persons, because they are the fictions of territorial law and cannot exist where that law has no authority.

Summary of  
the American  
Doctrine.

<sup>1</sup> *Bank of Augusta v. Earle (sup.)* at p. 588.

<sup>2</sup> *ex parte Schollenberger* (1877), 96 U.S. Rep. at p. 377.

<sup>3</sup> *Cp. Calvo*, vol. II., p. 229.

<sup>4</sup> "The inquiry is not whether the Defendant (Corporation) was personally within the State but whether he or someone authorised to act for him in reference to the suit had notice and appeared." *Lafayette Insurance Co. v. French (sup.)* at p. 405.

(2) But in the absence of express provision to the contrary it is to be assumed that the state out of comity has recognised the foreign juristic person and consented to its possession of personal status.

(3) By express enactment a state may refuse such recognition, or impose whatever conditions it pleases upon its concession.

(4) A foreign juristic person must always dwell in its state of origin, and can operate abroad by means of agents only.

Before dealing with the liberal system, it will be convenient to draw attention to some of the defects in the restrictive system. In doing so certain distinctions can be drawn which the restrictive system ignores, and upon which the liberal system insists as fundamental.

### Objections to the Restrictive System.

10. Whatever may be the merits of the theories of Laurent and other supporters of the system from the point of view of logical subtlety, they have one conspicuous defect, that they are at variance with the facts of modern life. The international activity of juristic persons of all sorts is constantly on the increase. The necessities of civilisation will not allow them to be restricted each within a single state. To deprive all foreign juristic persons of civil personality would be a fatal injury to civilisation in general and commerce in particular; and this would be the effect of an application of the theory in practice. To show that the theory would have such a result is at the present day a *reductio ad absurdum*. The modern civilised world has agreed to differ from Laurent as to the policy it ought to pursue with respect to juristic persons in general, and foreign juristic persons in particular, and all the more readily because the policy advocated and the theories maintained by the eminent jurist were not uninfluenced by certain personal prepossessions with which modern thought is at variance. He has a strong opinion about Roman Catholic religious associations "qui sont la lèpre des pays catholiques"; about their benefactors, "auxquels une Église avide de domination et de richesses vend un ciel imaginaire"; about their purpose, "monachisme, et ce qui l'accompagne

Disregard of  
the facts of  
social evolu-  
tion.

nécessairement, l'ignorance, la paresse, la mendicité, le fanatisme et les ténèbres de l'intelligence et de l'âme." This opinion he extends to all incorporation because of its element of perpetuity, by which man perpetuates "sa faiblesse plus que sa grandeur, car sa grandeur consiste dans sa perfectibilité infinie." Even commercial association does not escape the general reprobation, "qui trop souvent devienne un moyen de faire des dupes<sup>1</sup>." One may say that the principal exponent of the restrictive system has argued from a premiss which is not purely juridical.

It is however no sufficient answer to a theory to say that it is unpractical. But it may be said that the reasoning by which the restrictive system is supported is not only unpractical, but unsound. It will be convenient to accept for the present the basis of the system, which is the fiction theory, leaving it to be criticised in its proper place in connection with the liberal system. Even when that admission has been made, still it may be questioned whether the conclusions of Laurent and his school or of the lawyers of the United States are warranted by the theory on which they are based.

### *Recognition, Express or Implied.*

II. In the first place it may be said that it is totally illegitimate to make use of the word "recognition" to describe the formality by which it is said that a foreign juristic person must obtain personal status, whether it be express, or implied by comity. This incorrect use, and the confusion from which it results, together with several others that affect much of the reasoning on this subject, are caused by considering the obstacle in the way of a foreign juristic person as a physical barrier preventing it from crossing a territorial frontier, instead of as a juridical barrier, preventing it from passing from one law to another. The former point of view, that which lays stress upon the geographical position of the juristic person, is no doubt the correct one from which to consider questions of jurisdiction, at least in England and America. According to the common law "all jurisdiction is properly territorial, and *extra territorium jus dicenti, impune non paretur*. Territorial jurisdiction attaches (with special

Objections to the necessity for Recognition: (a) fictitious nature of juristic personality.

<sup>1</sup> Laurent, vol. IV., § 72.

exceptions) upon all persons, whether permanently or temporarily resident within the jurisdiction while they are within it: but it does not follow them after they have withdrawn from it, and when they are living in another independent country<sup>1</sup>." When inquiring therefore whether jurisdiction can be exercised over a foreign juristic person, it is material for an English or an American court to inquire whereabouts that person itself may be. But such an inquiry is misleading in connection with questions as to its status and capacity. The deduction from the "fiction" theory that a juristic person can exist only within the territories of the state which created it is relevant only to questions of jurisdiction. In dealing with questions of status and capacity we must deal with another and a more fundamental deduction, that a juristic person can exist only in the contemplation of the law of the state which created it, and can have no legal existence when that law is not contemplating it.

In what sense, then, can it be said to be capable of being "recognised" by another law? It is the law which created it which exercises itself, according to the theory, to maintain a personality in it, and the personality maintained is a fiction existing in contemplation, not of the members of the group or of public opinion, but of the law. It is not only created by an act, but it is also upheld in existence by an enduring state of the will of the sovereign authority, and apart from that will it has no objective existence. What is to become of such a personality when it seeks to become the subject of rights upheld by the law of some state other than its state of origin? For the sake of illustration we may consider the case of a contract made by an English company in France, and to be performed in France. The contract consists of an agreement and a resulting obligation, the nature of which is that it is a legal bond whereby constraint is laid on a person. The legal bond is imposed by the authority of the law of France. The parties to the contract must therefore be persons upon whom the law of France is capable of imposing its bond, or there can be no valid contract. They must, that is, be persons in contemplation of French law. But the personality of the English company is a fiction of English law. Apart from a state of the will of the sovereign authority of England, in

<sup>1</sup> *Sirdar Gurdial Singh v. Rajah of Faridkote* (1894), A.C. per Lord Selborne at p. 683.

which is its only existence, it is nothing ; and the law of France cannot contemplate a nonentity as exercising a capacity, or constrain it with a legal bond. If it does so there appears upon the scene a person feigned by and existing in contemplation of French law, and just as the original fictitious personality had no existence except as contemplated by English law, so this new personality will have no existence except as contemplated by French law. Since there is no real objective element in the fictitious personality of the company which can pass from the contemplation of one law to that of another, and preserve its identity, the company contemplated by French law must have a different identity from that contemplated by English law. French law may apply the rules of the English law of corporations to the regulations of the juristic personality, and so the one may be an exact reproduction of the other : nevertheless the two will not be identical, any more than one man's idea of a cube is identical with another man's idea of a cube, although both are ideas of the same abstraction.

It has been argued that a state has no more difficulty in recognising in a literal sense the fictitious personality of a foreign juristic person than it has in recognising a contract, for instance, made by parties beyond its jurisdiction who subsequently come within it<sup>1</sup>. Just as in that case, it might be said, there are not two contracts, but the contract is the same whether it is recognised by the law of one state or of another, so in the case of a juristic person there are not two personalities, but one. In fact, this instance well illustrates the impossibility of such a recognition in the case of a pure fiction. Even in the case of such a contract, the identity preserved by the legal relation under the circumstances is partial only. It contains a real and natural element, that of agreement, and this reality maintains its identity, as the real personality of a natural person does, in passing from the contemplation of one law to that of another. But the obligation which is imposed upon the agreement is created and upheld in existence by some law. When the parties migrate, the obligation imposed upon them is no longer an obligation of the law of the land in which the agreement was made, but of the law of the land to which they have migrated. The obligation suffers thereby the same change which the fictitious personality of a

<sup>1</sup> Story, § 106, p. 178, Bigelow's note.



juristic person suffers. It is no longer the same obligation, although, as in the case of fictitious personality, if the foreign state applies to the contract the rules of the law of contract of the state in which the agreement was made, it may be a precisely similar obligation. It is only the real element in the contract, that of agreement, that is capable of retaining its identity and of being recognised in the accurate sense of the word by the foreign state. *Ex hypothesi*, in juristic personality there is no such real element.

The word "recognition," therefore, which implies the pre-existence of some objective reality, is meaningless as applied to fictitious personality, and the express recognition demanded by the restrictive system is in fact nothing less than an express creation of a new juristic person, which may no doubt be an exact reproduction of the original one, and different in type from any juristic person domestic in the re-creating state. If we are to follow out the logical consequences of the fiction theory, we must admit that a juristic person when it becomes a subject of rights in a foreign state loses its original personality, and gains a fresh personality created by the foreign state. It follows that when a group apparently constituting a single commercial company, for instance, carries on business in several states, there are as many juristic persons as there are states. Since all the various juristic persons may, and probably will be, precisely alike, the distinction between recognition and re-creation is apparently purely academic, but it will be seen that it is of importance in connection with certain theories as to the tests which must be applied to distinguish a foreign from a domestic juristic person.

The arguments based upon these supposed elements in the nature of juristic personality, by which Laurent and his followers

(b) Public Policy. seek to prove that a foreign juristic person is not entitled to enjoy or capable of enjoying personal status, must appear to English and American lawyers to exaggerate the closeness of the connection between the juristic person and the state. It has been ingeniously argued<sup>1</sup> that in so doing they bring about their own downfall.

It is said that all corporations are part of the social organisation of the state, and that there is conceded to each in virtue

<sup>1</sup> Sacopoulo, part 1.

of this element in its nature, a part of the powers and personality of the state itself. It is generally admitted by the supporters of this theory that the state itself, once it has been recognised diplomatically as a person in public international law, must also be recognised as a person in private international law, entitled to personal status and possessing civil capacity. But the whole contains its parts, and the recognition of the juristic personality of the state must include the recognition of the juristic personality of all those corporations which, as it is said, are part of the state, and whose existence is indistinguishable from that of the state. The argument is one that must appeal more to those accustomed to legal systems which personify the state. It is of less importance from the point of view of English law which knows of no juristic person in private law called the state, or the fisc, but only of a royal corporation sole, which can scarcely be considered to include all other corporations as its parts.

The German language, by means of the words *Rechtsfähigkeit* and *Zweckthätigkeit*, calls our attention to the fact that every

(c) Civil Capacity and Functional Capacity.	person has two sorts of capacity. He has a private capacity in law, the capacity to be recognised as the subject of rights ; and he has a public capacity in society, the capacity to fulfil his mission in the world. The difference between the two is particularly clear in the case of juristic persons. They have two sorts of function to perform. On the one hand they can sue and be sued, contract and own property. These are their civil capacities ( <i>Rechtsfähigkeit</i> ). On the other hand they have their purpose to fulfil ; they can educate, heal the sick, insure lives, or mine gold. This we may call their capacity to discharge their functions, or functional capacity ( <i>Zweckthätigkeit</i> ). There is nothing in the nature of a juristic person to prevent it from exercising the former without exercising the latter <sup>1</sup> . A commercial company may sue for a debt in a country without carrying on any business there. A state may buy goods in a foreign country without exercising any function of government there. All reasoning hostile to the status and capacities of foreign juristic persons based upon the
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<sup>1</sup> "To admit juristic persons to the enjoyment of civil rights is not the same thing as to admit them to exercise their functions or to pursue the activities of their particular organisation, or in other words to transplant their institution to Italy." *Cour Cass. Turin Judgment of Nov. 18th, 1882 (in La Cassazione)*. See also Lainé, p. 282.

fact that they concern social interests and are therefore inseparably connected with the organism of some particular state, ignores this distinction. Their functional capacities may concern the social interests of a particular state, but their civil capacities do not. The mere power to sue and be sued, to contract and own property, bears no special relation to any one social organism rather than to another, and can be exercised in any state without interfering with that state's right to direct its own policy. An Italian religious order can make a contract in France without infringing any law against religious association. An English land company can sue a debtor in Russia without infringing the Russian laws against the owning of real estate by foreigners. The same confusion appears in the argument that a foreign juristic person has no status because it exists only in its capacities, which are measured by its object, and because its object, which concerns social interests, cannot be pursued abroad. Its capacities are indeed measured by its object; but they consist of the two sorts, functional and civil. The former alone concern social interests. Suppose that for that reason the juristic person cannot exercise them abroad; none the less can it exercise civil capacity abroad, because the exercise of civil capacity, in other words the performance of single acts in the law, does not necessarily entail the exercise of any functional capacity or involve any social interest. Arguments based upon the supposed relation of juristic personality to social interests, if they have any validity at all, are valid only to show that juristic persons must obtain the express permission of the territorial authorities before exercising their functional capacity in a foreign country, and no conclusion can be drawn from them limiting the power of juristic persons to exercise civil capacity abroad. A commercial association, for instance, may be compelled to obtain some permission before it carries on a regular business by opening a branch office or agency in a foreign country, but it should need no permission to enable it to perform isolated acts in the law connected with the business carried on by it in its domestic state. In practice this distinction is clearly recognised in our own law as to service of process, and in that of the United States<sup>1</sup>.

<sup>1</sup> "It is well settled that a single isolated act is not the carrying on of business by a foreign corporation, and a foreign corporation need not comply with statutory

*Comity.*

12. Laurent restricts foreign juristic persons by overstraining social interest, public policy, and the reality of statutes. In the

Criticism of  
the theory of  
Comity.

United States it may be said an opposite result is obtained by overstraining the doctrine of comity.

It is impossible to discuss here the general validity of that doctrine, but it is clear that the American theories are not likely to be accepted as a satisfactory explanation of the position of foreign juristic persons by the extensive school of jurists for whom comity is a meaningless word in private international law<sup>1</sup>. Even if the doctrine of comity be accepted, however, there are difficulties in the way of receiving it as a complete solution of the problems to which the fiction theory gives rise. The artificiality of the doctrine is apparent. No sooner is it admitted that juristic persons have no existence except in the contemplation of the law which created them than a fiction is invented to enable them to claim a universal existence. A fictitious disability is overcome by a fictitious recognition, and thus one fiction cancels out the other. There is a further fundamental objection to the sufficiency of any implied recognition in this connection. As it has been seen, it may be said that such recognition is nothing less than re-creation, but whether it be that or a true recognition, it is in its nature an exercise of the sovereign authority of the state. The fictitious personality of a juristic person owes its existence to a continued state of the will of the sovereign authority, and until the foreign state exercises that will in its favour by an act of sovereignty, it can have no existence. Such an act of sovereignty is essentially positive or express in its nature, and it should be performed by the legislature, or some other proper authority to which the legislature has expressly delegated appropriate powers. It is possible no doubt to deduce the policy of the state by implication, and in the absence of any express declaration. But recognition is a matter, not of a policy, but of an act, and for the courts to presume by implication that an act has been performed, when the fact of

requirements in order to perform it." *Frawley v. Pennsylvania Casualty Co.* (1903), 124 F.R., p. 259.

<sup>1</sup> See Pillet, *passim*; Burge's *Commentaries*, ed. Renton and Phillimore, 1908, vol. II., chap. I.

the matter is that it has not, is the same thing, stripped of fictions, as for the courts to perform that act themselves. In assuming a recognition to be implied by comity, therefore, and in asserting that such comity has the controlling force of legal obligation, the courts, in spite of professions to the contrary, are in fact themselves assuming to perform an act of sovereign authority, and are thus usurping the functions of the legislature in a manner which no phrase about exercising the comity of the state can conceal<sup>1</sup>. It is indeed said that in coming to the contrary conclusion, and refusing to assume an implied recognition, the courts would be forestalling the decision of the state, and saying in advance of the legislature what its interests and policy demand. But this statement could only be supported if some positive act of the legislature were necessary in order to deprive a foreign juristic person of status, whereas it is admitted that it is to confer status that the consent of the state is necessary; and, as has been seen, the nature of such consent is that it must be a positive act. Again, the other reasons given for the presumption by the courts of an implied consent are inconsistent with this contention, and with their professed regard for the proper sphere of action of themselves and of the legislature respectively. A sovereignty, it is said, must designate its own line of policy, and courts must not forestall its decision. And yet we find the courts basing the necessity for an implied recognition on an economic discussion concerning the needs of the United States for large amounts of combined capital. Such inconsistencies are not accidental; they are inevitable when the courts have once disregarded facts by fictitiously assuming that the state has performed an act which it never has performed.

13. The personality of the juristic person, it is said, is preserved by staying at home while its agents operate for it abroad. This theory has usually been advanced in connection with the doctrine of comity, and as if it were auxiliary to it. But it seems clear that if it is a satisfactory explanation of the legal status of a foreign juristic person, we need not trouble ourselves further about comity. If the idea of agency is relevant to the matter at all, it must be by relieving the state altogether from the necessity of considering the status of the foreign juristic person, and no special comity

Criticism of  
the theory of  
action by  
agents.

<sup>1</sup> Cp. Laurent, vol. IV., §§ 132, 135.

need be exercised to recognise that a natural person is an agent. But from what has been said above in discussing the meaning of the word recognition, it appears that this theory is another instance of the confusion which results from a too pictorial or geographical, instead of a juridical, conception of the limitations of a legal fiction. According to the common law, it is well known, a juridical person can act nowhere, at home or abroad, except by agents. No doubt persons who have made contracts of agency can cross physical frontiers; but the frontiers which they must cross to overcome the difficulties of the fiction theory are not physical, but juridical. There is here no question of a physical capacity of the principal to take a journey to a foreign land, but of its juridical capacity to be regarded as the subject of rights by a foreign law. *Ex hypothesi* the principal, apart from comity, cannot be so regarded. It is non-existent in the eye of the foreign law; and if the principal is non-existent, the agent is no agent, for how can there be an agent without a principal? Further, as will be seen in considering the liberal system, the Courts of the United States have gradually come to consider, even from the geographical standpoint, that a juristic person is not necessarily confined within the territories of its state of origin, but may appear in a foreign state, not by its agents only, but in its own personality, and may in a true sense be said to be present there.

### **The Liberal System.**

14. In opposition to the theories which have been discussed, it is maintained that foreign juristic persons are both capable of being regarded and entitled to be regarded as legal persons and the subjects of rights in the same manner as natural persons. The theory rests upon the similarity between juristic persons and natural persons in all relevant characteristics. Historically it has been influenced and promoted by the development of the theory that juristic personality is real and not fictitious: but it does not necessarily rest upon that theory, or involve a general inquiry into the wider controversies to which brief reference has already been made. Without entering into metaphysical questions as to the extent of the reality of juristic personality, it is necessary only to call attention to certain points of resemblance between

(a) Analogy  
between  
juristic and  
natural  
persons.

juristic and natural persons which constitute elements of reality in the nature of the former, and thus to show that juristic persons possess the same qualifications as natural persons for admission to the personal status which is universally conceded to the latter.

It is fallacious, it is said, to differentiate the juristic from the natural person on the ground that, while the latter is a natural creature, the former is the artificial creation of some sovereign power. Law is concerned only with the legal aspect of personality, the capacity of being a subject of rights. Personality in this sense must always be created by the law, and can never be a natural creation. Nature produces a body, but the law clothes it with rights. So even in the case of natural persons the law can refuse to confer legal personality, or take it away again after it has conferred it. The natural body of one born in slavery, for instance, may never become a legal person. It may remain a chattel, an object, not a subject, of rights. According to the Civil Law a legal person might formerly, in consequence of crime or encloistration, become *civiliter mortuus*, and be deprived of personality. The truth is that legal personality is conceded by the law to natural persons as well as to juristic persons. In both cases the law gives it and the law can take it away; and if for this reason the personality of a juristic person is to be called artificial, so must that of every man<sup>1</sup>.

It may be objected that the true difference between the two sorts of person is to be found in the nature of the substratum upon which the law confers personality: that in a natural person it is flesh and blood; that in a juristic person it is not; and that this is the specific difference which reduces the personality of a juristic person to mere fiction, and prevents it from enjoying natural rights. But here again further analysis shows that there is no true distinction between the two sorts of person. In the juristic person also there is a substratum of flesh and blood; it is that of the natural persons who are its members. The causes of the personification are the necessities and interests of natural persons. "The legislature," says Fiore, "does not make this organism; it finds it ready made, a product of the natural development of human activity, and then attributes personality to it, because to personify it is useful and indispensable to the

<sup>1</sup> *Cour Cass. Belg.*, Pasirasie, 1847, 1., 392.

fuller and more complete development of natural personality. The true reason therefore for the personification of these juristic persons is to be found in natural personality and it is impossible to refuse to recognise the personification in principle without sterilizing sources of the more complete development of human activities<sup>1</sup>." Behind the artificial person there stands a group which desires to effect some object common to its members, and which the law clothes with special powers for that purpose. Without the law to confer the powers, the group could not exercise them; but without the group to receive the powers, the law could not confer them. The substratum of natural personality may be difficult to find. In the case of a *fondation* or *Stiftung* it may have to be sought afar off in the greatest of all groups, the state. But in every case the creation of a juristic person is nothing else than the manifestation of one of the faculties of a natural person, the right of association; and at bottom, as it has been well said, "les personnes morales ne sont pas autre chose que des modalités de la vie juridique des personnes naturelles<sup>2</sup>." There is nothing in the nature of the subjects of rights in question, or in the manner in which they became subjects of rights, to exclude them from the rights universally accorded to natural persons in private international law<sup>3</sup>.

Whatever may be the extent of the reality of juristic

<sup>1</sup> Fiore, vol. 1., § 318. He is speaking here of juristic persons of the type of the *società*. Previously he has stated that juristic persons cannot be assimilated in private international law to natural persons, because "the juristic person has not by nature any capacity for rights, but on the contrary such capacity is attributed to it by the civil law alone" (§ 317). In this section he qualifies the above statement by admitting that it applies only to juristic persons of the type of the *universitas bonorum* (*istituzione, fondazione, stabilimento*, see § 303), and not to those of the type of the *società* for the reasons quoted. Agreeing, however, with Laurent that the existence of every juristic person concerns social interest, and failing to distinguish between civil and functional capacity, he comes to the conclusion that the foreign juristic person must always obtain recognition, express or implied (§ 320).

<sup>2</sup> Lainé, p. 273; and the same author in *Archives Diplomatiques*, 1893, part 2, p. 117 et seq.; see also Despagnet, No. 61, 606; Surville and Arthuys, §§ 137 and 452 (commercial associations); Wahl, in Sirey, 1900, 4, 25; *Avis du Conseil d'État*, Jan. 12, 1854; Pillet, § 73; Rattigan, pp. 45, 74.

<sup>3</sup> Cp. Haladjian, p. 16 et seq.; he admits that there is no valid juridical distinction between natural and juristic persons; but argues that nevertheless the latter (except commercial associations, p. 35) are not entitled to the enjoyment of personal status abroad on the same footing as the former, on the grounds that their acts are "necessarily clothed with a political character" (p. 19). Clearly he fails to distinguish between civil and functional capacity.



personality, it is still true that in so far as it is fictitious because it is received from the law, so is natural personality; that in being none other than a phase in the juridical life of natural persons, it has at least an element of reality very material in the present connection; and that there is in consequence in private international law at least no essential difference between it and a natural person. It follows that all the conclusions in favour of restriction based upon that difference fall to the ground. Since a juristic person shares the natural existence of natural persons, it must share their natural rights also. No recognition of any sort is necessary to confer upon it personal status: it shares the unquestioned and universal recognition which all civilised states accord to the personality of natural persons<sup>1</sup>. Of such recognition, in the strictest sense, it is capable, because it has in its nature at least an element of objective reality, which is capable of passing from the contemplation of one law to that of another, whilst preserving its identity. The status which it thus obtains does not indeed depend on the same circumstances, age, sex, and so forth, as that of natural persons, but it depends on analogous circumstances in the life of the juristic person, its type, its position in respect of public powers, the purpose for which it was formed, and the manner in which it must act to attain its purpose<sup>2</sup>.

This system is the natural basis upon which to rest liberal conclusions as to the practical position of foreign juristic persons like those of the American theory, and like those which, as will be seen in the second part of this work, have been established in English law without reference to any theory at all. It sweeps away the artificial structure of technical exclusion remedied by implied recognition, and substitutes for it the simple expression of a fact, that foreign juristic persons are actually contemplated by the courts as subjects of rights on the same footing as natural persons. A few isolated expressions may indeed be found in American decisions which show that the ideas of the liberal system have at times recommended themselves to American judges, although,

(b) Its relation  
to the Com-  
mon Law.

<sup>1</sup> Cp. Gianzana, *Lo Straniero nel diritto civile*, 1., p. 157; Lomonaco, *Le persone giuridiche straniere et le giurisprudenza Italiana*, *Il Filangiere*, 1885, p. 379; Bard, *Précis de Droit International*, p. 197.

<sup>2</sup> Sacopoulo, p. 123; Lainé, p. 283.

constrained by authority, they have been unable to adopt them. We find it said that "a corporation may own property, may transact business, may contract debts, it may bring suits, it may use its common seal, nay, it may be sued within a foreign jurisdiction provided a voluntary appearance is entered to the action. It has then existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. For all practical purposes its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it. It may perform every action without the jurisdiction of the sovereignty which created it that it may within it. Sound principle requires that while the *powers* of corporations are worldwide, while for all practical purposes they may exist and act everywhere, the technical rule of the common law, that they exist only within the jurisdiction of the state which created them, should be applied only within its strictest limits, and not be suffered to defeat the obvious claims of justice<sup>1</sup>." In the same judgment however we find it said that the existence of a corporation "anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has": the inconsistency between the two points of view is not recognised, and the court can only come to the singular conclusion that there is a conflict between justice and the law in which justice should prevail.

15. If the status of a juristic person be considered in the geographical manner which is common in American decisions, it appears that according to the liberal system there is no reason why a juristic person should be said to be confined within the territories of its state of origin. In virtue of its real existence it can, like a natural person, pass from state to state, and claim to be recognised as a subject of rights in each. It is a remarkable confirmation of the liberal system that the courts of the United States have in course of time been driven to this very conclusion. Abandoning the logical deductions which they had themselves correctly drawn from the fiction theory, they have come to admit that a corporation can in a true sense be said to be itself present and resident within a foreign state. This conclusion has been arrived at in connection with questions of service of process. It

Breakdown  
of the Re-  
strictive  
System in the  
United States.

<sup>1</sup> *Moulin v. Insurance Co.* (1853), 1 Dutcher, p. 57; s.c. 24 N.J.L., p. 222.

was the old rule of the Common Law that service of process on a corporation, since it could not be personal, must be made upon its head officer, and, since "his functions and character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character," the service must be made "within the jurisdiction of the sovereignty where this artificial body exists<sup>1</sup>." According, therefore, to the doctrine, established in the *Bank of Augusta v. Earle*, that a corporation can have no legal existence outside its state of origin, and that its place of residence and domicile are there and nowhere else<sup>2</sup>, it must always be impossible to effect service of process upon a foreign corporation and to bring a personal action against it. Unless it should consent to accept service or appear voluntarily, proceedings against it would be necessarily confined to the disposition of such property belonging to it as might be found within the jurisdiction<sup>3</sup>. This conclusion was at one time accepted by the courts of Massachusetts, New York, and Connecticut<sup>4</sup>; and both in those states and in many others which followed their example, a remedy had to be found to remove the difficulty. It was felt that the strict consequence of the fiction theory was both inconvenient and unjust, and that there was "no satisfactory or substantial reason why the technical rules of the common law respecting suits against corporations, should not, like many other rules respecting them, be so far modified and made to yield, as to correspond with the present state of things, and to accomplish the ends of justice<sup>5</sup>." "Whilst the theoretical and legal view that the domicile of a corporation is only in that state where it is created was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices and carried on business there it was in effect as much represented by them there as in the state of its creation. Serving process on its agents in other states for matters within the sphere of their agency, is in effect serving process on *it* as much as if such agents resided in

<sup>1</sup> *M'Queen v. Middletoun Manufacturing Co.* (1819), 16 John. Rep., p. 4; approved in *Peckham v. North Parish in Haverhill* (1834), 33 Mass. at p. 286.

<sup>2</sup> *Insurance Co. v. Francis* (1870), 11 Wall. at p. 216.

<sup>3</sup> *St Clair v. Cox* (1882), 106 U.S. Rep., p. 350; *Peckham v. North Parish in Haverhill* (*sup.*).

<sup>4</sup> *Murfree*, § 182.

<sup>5</sup> *March v. Eastern Railway Co.* (1860), 40 N.H. at p. 577.

the state where it was created<sup>1</sup>." Statutes were accordingly passed in many states to provide for service on foreign corporations, in most cases by imposing on foreign corporations the necessity for the appointment of an agent to accept service of process as a condition precedent to leave to carry on their business in the state.

In New Hampshire, however, the courts at an early date rejected the strict consequence of the fiction theory in this respect. It was admitted that corporations could not "emigrate," but if, it was said, "upon principles of law or comity corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognise their existence for one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here. (There is) nothing in the character of a corporation to prevent its suing or being sued like a natural person. It is, in legal contemplation, a person having existence, invested with rights, and subjected to liabilities<sup>2</sup>." As the activities of foreign corporations increased this opinion gained ground, and that which sought to confine the personal presence of corporations to their state of origin is now almost, though not quite, abandoned. The statutes referred to have in most cases removed the practical difficulties in the way of service: but the better opinion appears to be that even apart from the operation of those statutes a corporation can be said under certain circumstances to be present itself in a foreign state. "Natural justice," it is said, "requires that corporations should be subject to the laws of the state they invoke. For the purpose of being sued they ought to be regarded as voluntarily placing themselves in the situation of citizens of that state. And such it seems would be the rule independently of any express statute authorising the mode of serving process<sup>3</sup>": and it has been "very authoritatively decided" that a corporation "doing business in a state other than that from which its charter is derived, and in which its

<sup>1</sup> *St Clair v. Cox* (1882), 106 U.S. Rep. at p. 356.

<sup>2</sup> *Libbey v. Hodgdon* (1838), 9 N.H., p. 394.

<sup>3</sup> *per Elmer, Justice*, 4 *Zat.*, p. 234.

principal office is held and its chief business is conducted, may be sued and brought into court in that state by the service of process on its agent there independently of any state law or warrant of attorney expressly authorising such service<sup>1</sup>. We find the orthodox doctrine maintained that a corporation has no "faculty to emigrate," and "can exercise its franchises extra-territorially only so far as may be permitted by the policy or comity of other sovereignties," and yet in the same judgment it is said that a foreign corporation "like a natural person, may have a special or constructive residence, so as to be charged with taxes and duties or be subjected to a special jurisdiction<sup>2</sup>." The conditions necessary in order that a foreign corporation may be said to be present within the state so that service of process may be effected upon it through its agents, apart from the effect of a statute or of express consent, have been clearly defined. Service upon an agent, even a director, who is present within the state, but not upon the business of the company, is not sufficient under the general law<sup>3</sup>. Nor is it sufficient even if an agent is temporarily present within the state upon some special business of the corporation<sup>4</sup>, although he is the president of the corporation. A statute of the state of New York legalising such service, although it is of course binding on the courts of that state<sup>5</sup>, has been disregarded by the courts of other states and by the Supreme Court on the grounds that it is contrary to natural justice that a court of justice should exercise jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service within the jurisdiction upon him or upon someone authorised to accept service on his behalf, or by his waiver of the want of due service<sup>6</sup>. In order that the service may be valid

<sup>1</sup> *Moch v. Virginia Fire and Marine Insurance Co.* (1882), 10 Fed. Rep., p. 696; referring to *Moulin v. Insurance Co. and Railroad Co. v. Harris* (*sup.*).

<sup>2</sup> *St Louis v. The Ferry Company* (1870), 11 Wall. at p. 429.

<sup>3</sup> *Reilly v. Philadelphia &c. Railway Co.* (1901), 109 Fed. Rep., p. 349.

<sup>4</sup> *Good Hope Co. v. Railway Barb Fencing Co.* (1884), 22 Fed. Rep., p. 635.

<sup>5</sup> *Pope v. The Terre Haut Car &c. Co.* (1881), 87 N.Y., p. 137.

<sup>6</sup> *Goldey v. Morning News* (1895), 156 U.S. Rep., p. 518. The Irish Court of Appeal has expressed a similar opinion as regards this statute. "No court can confer jurisdiction on itself merely by deciding wrongly that it has it. Suppose a small Republic passed an Act of Parliament in these terms, 'Be it enacted that the High Court of Monaco shall have jurisdiction to try and determine all causes of action arising anywhere throughout the world, between subjects of whatever states,

the corporation must be present itself within the state. It can only be said to be so present when it is engaged in business in the state<sup>1</sup>. Such business must be a substantial part of its regular business<sup>2</sup> and not a mere isolated act<sup>3</sup>: and the corporation must have in the state an agent whose duty it would be to report the fact of service to the corporation<sup>4</sup>. When these conditions are fulfilled the corporation is spoken of indifferently as having a residence, domicile<sup>5</sup>, or business domicile<sup>6</sup>, within the state.

A similar evolution of opinion took place in connection with the special jurisdiction of the Federal courts, as distinguished from the state courts. The Judiciary Act of 1789 provides that no civil suit shall be brought in a Federal court against an inhabitant of the United States, by original process "in any other district than that whereof he is an *inhabitant*," or "in which he shall be *found* at the time of serving the writ<sup>7</sup>." Interpreting this enactment, the Federal courts at first held that a corporation could not be an inhabitant of or found within a state other than its state of origin on the grounds that "a corporate body created by the law of a sister state can have no corporate existence beyond the limits of the territory within which the law creating it can operate<sup>8</sup>." Subsequently this opinion was modified; and it was decided that a corporation could be

provided that the alleged claims are assigned for a nominal consideration to a subject of this republic, in order that he may sue thereon as attorney for the claimant; Court fees 10 per cent. on the amount recovered.<sup>9</sup> In my opinion there is at least a reasonable prospect that it might be successfully argued in the Court of any foreign country—that such an enactment could not bind foreigners." *Dennis v. The Leinster Paper Co. Ltd.* (1901), 2 Q.B.Ir. at p. 347, per FitzGibbon, L.J.

<sup>1</sup> *St Clair v. Cox* (*sup.*); *Fitzgerald Construction Co. v. Fitzgerald* (1890), 137 U.S. Rep. at p. 106; *in re Hohorst* (1893), 150 U.S. Rep. at p. 663; *Connecticut Life Insurance Co. v. Spratley* (1899), 172 U.S. Rep., p. 602; *Central Grain and Stock Exchange of Hammond v. Board of Trade of City of Chicago* (1903), 125 Fed. Rep., p. 463.

<sup>2</sup> *People v. Horn Silver Mining Co.* (1887), 105 N.Y. at p. 83.

<sup>3</sup> *Frawley v. Pa. Casualty Co.* (1903), 124 Fed. Rep. at p. 264.

<sup>4</sup> *Strain v. The Chicago Portrait Co.* (1903), 126 Fed. Rep., p. 831; and see generally *Thompson*, §§ 7989, 7995, 8044.

<sup>5</sup> *Conley v. Mathieson Alkali Works* (1903), 190 U.S. Rep. at p. 411; *Riddle v. New York L. E. and W. R. Co.* (1889), 39 Fed. Rep. at p. 291.

<sup>6</sup> *Southern Cotton-oil Co. v. Wimple* (1890), 44 Fed. Rep. at p. 27; *A. G. v. Bay State Mining Co.* (1868), 99 Mass., p. 148.

<sup>7</sup> 1789, chap. 20, § 11, U.S. Stat., vol. 1., p. 79; re-enacted 1875, chap. 137, § 1, U.S. Stat., vol. XVIII., p. 470; U.S. Rev. Stat., § 739.

<sup>8</sup> *Day v. Newark India-Rubber Manufacturing Co.* (1850), 1 Blatch C. C. Rep. at p. 632.

"found" within a foreign state: "when a corporation has so far identified itself with a locality beyond the state of its creation and domicile as to be found there for practical business purposes, it is reasonable to treat it as there also to respond to its obligations when called upon to do so in the courts of that locality<sup>1</sup>." Effect was first given to this reasoning in cases in which a state statute existed enforcing the appointment by foreign corporations of an agent for service of process, on the grounds that, by carrying on business in a state in which such a statute existed, the foreign corporation had implicitly consented to be "found" there, and that such consent was sufficient to give the Federal courts jurisdiction<sup>2</sup>. It was extended also to cases in which no such statute existed and the "finding" of the foreign corporation depended only upon the fact that it was doing business within the district<sup>3</sup>. The courts of the United States have in fact not only come to regard the presence of a corporation outside its state of origin as a possibility, but now consider it as something more than a fiction or a figure of speech. They treat it as a question of fact to be decided by reference to natural and physical circumstances similar to those which establish the presence of a natural person. This result is inconsistent with the admitted consequences of the theoretical basis of the restrictive system. It is an admission of one of the actualities which the liberal system seeks to generalise and explain.

<sup>1</sup> Good Hope v. Railway Barb Fencing Co. (1884), 22 Fed. Rep., p. 635.

<sup>2</sup> *ex parte* Schollenberger (1877), 96 U.S. Rep., p. 369; Hayden v. Androscoggin Mills (1879), 1 Fed. Rep., p. 93.

<sup>3</sup> Wilson Packing Co. v. Hunter (1879), 8 Biss., p. 429; and see Merchants Manufacturing Co. v. Grand Trunk Railway Co. (1882), 13 Fed. Rep., p. 358; *contra*, Boston Electric Co. v. Electric Gas Light Co. (1885), 23 Fed. Rep., p. 838; and see U.S. v. American Bell Telephone Co. (1886), 29 Fed. Rep., p. 17. Schultz v. Diehl (1910), 217 U.S.R., p. 594. It must also be observed that the Judiciary Act of 1875 has now been altered by an Act, chap. 373 of 1887 (U.S. Stat., vol. XXIV., p. 552), according to which a Federal court has jurisdiction over those only who are *inhabitants* of, or have their residence in, its district; and that the Federal courts have decided that a foreign corporation must necessarily be an inhabitant of, and have its residence in, its state of origin only. *Filli v. Delaware &c. Railway Co.* (1888), 37 Fed. Rep., p. 65; *Bensinger &c. Cash Register Co. v. National Cash Register Co.* (1890), 42 Fed. Rep., p. 81. It will be observed that under the Judiciary Act, 1875, once it was decided that a foreign corporation could be *found* within the district, it was unnecessary to decide whether it could be an *inhabitant* or not.

*International Customary Law.*

16. Before quitting the subject of the liberal system it is necessary to refer to the theories of certain distinguished jurists, who, while maintaining that foreign juristic persons are entitled to personal status, arrive at the conclusion in a manner different from that already described. According to these, the extra-territorial force of laws depends, not on international courtesy only but on necessities which civilised states are not at liberty to disregard. When therefore it is found that extra-territorial force is universally accorded to a certain sort of law, that law in its application to particular cases is not a law of the territorial sovereignty alone, but is a true international customary law which must not be infringed by particular sovereignties. Such an international customary law, it is said, exists as to the recognition of foreign juristic persons. "If states and nations," says Von Bar<sup>1</sup>, "are to walk in legal community with each other, they will *de facto* be forced to a mutual recognition of the juristic persons that are constituted or have grown up in the territory of their neighbours as the possible objects of legal consideration. The practice of international law gives its sanction to this necessary recognition." Pillet, proceeding upon the basis that there is a fixed international law which limits the liberty of the state<sup>2</sup>, concludes that "the existence of juristic persons, constituted regularly and without fraud, according to the law of any country, has a definite international validity, and ought to be recognised everywhere<sup>3</sup>." "The Society," say Asser and Rivier<sup>4</sup>, "which has legally acquired the quality of a joint stock company in the country in which is its principal office (*siège social*) ought to be considered as such everywhere: we see here a true modern customary law." "In virtue of the principle of the community of law between civilised states," says Fiore, "it cannot be denied that all juristic persons ought to be admitted to the enjoyment of international existence, and ought to possess the faculty of fulfilling their activities beyond the territorial limits of the state in which they were constituted in virtue of the law<sup>5</sup>."

<sup>1</sup> Von Bar, § 104.<sup>2</sup> Pillet, p. 171.<sup>3</sup> Pillet, p. 206.<sup>4</sup> Asser and Rivier, § 27, No. 98, p. 202.<sup>5</sup> Fiore, § 318; see also Brocher, pp. 185—188.



It is not easy to fix the exact meaning of such expressions. It may be meant that there is a source of international legal authority superposed upon the legal authorities of particular states, and that a juristic person is capable of being so related to it as to receive from it a universal existence. Upon this hypothesis the juristic person in private international law would occupy a position analogous to that occupied in the law of the United States by corporations created by Congress which, owing their existence to an authority superposed upon the authorities of the particular states, are entitled *ipso facto* to personal status in the several states. This hypothesis certainly clears away all difficulties in the way of the foreign juristic person, even those suggested by the most rigid insistence on their fictitious nature. Accepting Laurent's challenge, it provides us with a universal legislature capable of creating a universal fiction. In order effectively to criticise it, it is not necessary to discuss the question of the existence of a source of international legal authority, capable of qualifying the authority of particular states. The objections to it arise from the facts of the case. As a matter of fact, juristic persons, in so far as they are related to any legal authority, whether they owe to it their existence or only recognition, are so related immediately to the authority of some particular state. In order to maintain the doctrine under discussion it would be necessary to assume that upon their seeking to operate abroad, that relation implicitly extends itself to the international authority, and upon the termination of those operations, implicitly contracts again. The juristic person would thus undergo a latent and temporary change of nature whenever, for instance, it made a contract abroad: an hypothesis which would be a veritable extravagance of fiction mongering. Besides, if the foreign juristic person owes its status to an international authority, what is its nationality and what its personal law? A second and more reasonable interpretation to put upon such expressions is, that from the source of international legal authority there emanates a rule of positive international law, which particular states may not disregard, that the juristic persons of each state must be admitted to the enjoyment of personal status in every other state. Again, apart from any question as to the validity of the conception of a source of international legal authority, the facts of the case interpose insuperable obstacles to

the admission of any such theory. A rule of international law of this nature could be deduced only from a universal custom in all civilised states to recognise the personal status of foreign juristic persons, or at least from a very general agreement in the matter. In fact there is no such general agreement, far less any universal custom. Many varieties of treatment are accorded to foreign juristic persons, and important differences exist between the rules applied to them. At one end of the scale there is the extremely hostile attitude of Russia<sup>1</sup> and Austria<sup>2</sup>; at the other, the liberal attitude of Italy<sup>3</sup> and England. It is impossible to reconcile such divergent rules of law so as to find any common agreement between them capable of being expressed as a general custom. No doubt the history of the subject shows that there is a tendency towards a greater similarity in the rules and that the tendency is in the direction of greater liberality in the recognition of foreign juristic persons. But the fact that the rules in various states are approaching an agreement proves that an agreement has not yet been attained: and it is only from actual agreement that the existence of a rule of positive international law could be demonstrated.

### *International Resolutions.*

17. The conclusions of the liberal system, by whatever process of reasoning they may have been arrived at, have been adopted by all international associations and conferences which have discussed this subject. The Institute of International Law, at its session held at Hamburg in 1891, passed the following resolutions, as part of a series dealing with commercial associations only:—

“(Art. 1.) Companies limited by shares constituted in conformity with the laws of the country of their origin can sue and be sued in other countries without the necessity for any general or special authorisation. They have the right to carry on business there, obeying the laws and rules of public order, and to establish any sort of agency or branch office<sup>4</sup>.”

<sup>1</sup> Cp. Wauvermans, “Des sociétés anonymes étrangères en Russie,” *Revue de Droit International Privé*, 1905, p. 71.

<sup>2</sup> Ordinance of November 29th, 1865, and Law of May 29th, 1873.

<sup>3</sup> *Code Civil*, 1865, Arts. 3 and 6; interpreted by judgment of *Cour Cass. Turin*, Nov. 18th, 1883; also *Code Comm.*, 1882, arts. 230—232.

<sup>4</sup> *Annuaire de l'Institut de Droit International*, XI., p. 171.

At its session held at Copenhagen in 1897 the Institute dealt with "public" juristic persons, and resolved *inter alia* as follows :

"(Art. 1.) Public juridical persons, recognised in the state in which they came into existence, are recognised fully and as of right (*de plein droit*) in other states<sup>1</sup>."

The Congress of Companies Limited by Shares which met in Paris on the occasion of the international exhibition of 1900 passed a resolution identical in substance with that adopted by the Institute of International Law in 1891. The International Law Association in 1906 adopted in principle and in 1907 finally approved the following resolution, as a section of a draft international code.

"(1) Any foreign country duly incorporated shall be recognised in — in the same manner as if it had been duly incorporated in —<sup>2</sup>."

This resolution is the more interesting in that the second section of the code, dealing with domicile, shows no undue subservience to abstract theory. The interesting congress on private international law held at Montevideo in 1888-1889, which resulted in a treaty between Uruguay, Argentina, Paraguay, Brazil, Chile, Peru and Bolivia, contained the following resolution :

"(Art. 5.) Companies or associations which bear the character of juridical persons shall be ruled by the laws of the country of their domicile. They shall be recognised as such fully and as of right in the contracting states, and as capable of exercising civil capacity there, and of suing and being sued. But for the performance of acts which form the object of their existence, they shall be submitted to the laws enacted by the state in which they desire to perform those acts<sup>3</sup>."

The distinction between civil and functional capacity is here drawn with great precision.

18. It will have been observed that the theory referred to as the restrictive system consists of refined reasoning based upon

<sup>1</sup> *Annuaire de l'Institut de Droit International*, xvi., p. 307.

<sup>2</sup> 23rd and 24th Report of the International Law Association.

<sup>3</sup> Cp. "Le Congrès de Droit International Sud-Américain et les Traités de Montevideo," Pradier-Fodéré, *Revue de Droit International et de Législation Comparée*, xxi., p. 217.

Summary of  
the Liberal  
System.

general and highly technical hypotheses; and that owing to the necessity of adjusting it to changing circumstances it has become highly elaborated. The liberal system is content to find juridical expression for actual facts. The arguments for it consist largely of negative criticisms directed against the *a priori* reasoning of the restrictive system, but in its positive form it may be summarised as follows:—

(1) There is no essential juridical difference, at least in the domain of private international law, between juristic and natural persons.

(2) Foreign juristic persons should therefore be admitted to the enjoyment of personal status in the same manner and on the same basis as foreign natural persons.

## CHAPTER III

### CAPACITY

1. TWO distinct inquiries are necessary in order completely to define the juridical position of any foreigner. In the first place it must be ascertained whether he possesses personal status; and in the second place, and supposing that he does, it must be ascertained what his capacities are in virtue of his status, and in what manner he may exercise them. When it has been decided that he is a subject of rights, it remains to decide further of what rights he is the subject. In the preceding chapter the first of these inquiries has been pursued in relation to foreign juristic persons; and it has been considered whether it is possible to extend to them the principles which govern the status of foreign natural persons. The same course will be followed in the present chapter in pursuing the second inquiry, that concerning the nature and extent of their capacities.

2. It is generally agreed that foreign natural persons possess, in virtue of their personal status, a personal law. Subject to specific reservations in favour of the territorial law, their capacities are measured and the exercise of them is regulated, not by the rules of law of any country in which they happen to find themselves, but by the rules of law of the country in which they are domestic, which are, as it were, permanently attached to them, and follow them wherever they go. In order to complete the analysis of the position of foreign juristic persons, it is necessary to ascertain whether the same principle is applicable to the determination of their capacities also. An inquiry as to the kinds of capacity which they are capable of exercising, and the manner in which they must exercise them, takes therefore in the first place the form of an inquiry whether, when once they have been admitted to possess

personal status, they possess also a personal law; and if so, to what legal relations that personal law is applicable, and what reservation on the other hand must be made in favour of the territorial law. This need for the present involve no discussion as to the country, of which the rules of law must be regarded as the personal law of a certain juristic person; a matter which will be dealt with in the following chapter. It is enough for the present to define its personal law, if any, as those rules of law which are permanently attached to it and follow it wherever it goes, to govern its constitution and capacities, and which consist partly of the provisions of its constituting documents, and partly of the rules of positive law applicable to it, as an individual or as a member of a class, either expressly or implicitly, in the country in which it is domestic.

Questions as to the nature and extent of the capacities of a foreign juristic person are intimately connected with the question as to its status. The various answers which have been proposed to them follow indeed as simple deductions from the theories as to the personal status of a foreign juristic person which have already been discussed, and they admit of a corresponding classification.

### **A Foreign Juristic Person is incapable of possessing a personal law.**

3. Laurent argues that foreign juristic persons must obtain express recognition from the state before they can possess personal status: and not content with this, he continues to pursue them with relentless hostility even after such recognition has been obtained.

They are not entitled to possess, he argues, and are incapable of possessing a personal law: and their constitution and all their capacities must in consequence be wholly governed by the territorial law. The argument by which he seeks to establish this result has the same basis as that which he employs to show that foreign juristic persons can have no personal status. All rules of law, he contends, are *prima facie* of territorial application only; all "statutes" are real. That natural persons should have a personal law which follows them wherever they go, and by which their capacities are everywhere governed, is an

System  
denying a  
personal law  
to juristic  
persons.

exception to the general rule. The reason for the exception is that differences of race and of geographical surroundings produce differences in the human species, and that consequently rules of law evolved in relation to the inhabitants of one country may not be at all suitable to the inhabitants of another. Natural persons have a personal law because they have sex, age, state of mind, family relations, religion, and nationality or domicile. Juristic persons have none of these things. There is therefore no reason why they should be included in any exception made in favour of natural persons: and that law must be applied to govern their constitution and capacities which is applicable for that purpose according to the general rule<sup>1</sup>. It follows that when by means of an express recognition a foreign juristic person has obtained a personal status, the capacities which it obtains in virtue of that status must be regulated by the territorial law alone. The laws by which its constitution and capacities were regulated in the state in which it is domestic can no longer be applied to it; it must be subjected to all the rules of the territorial law relating to juristic persons. In the result the foreign juristic person has forced upon it the character of the juristic persons of the same type which are domestic in the state from which it has obtained recognition.

The same result, it is said, is necessitated by the relation of a juristic person to the state. All laws relating to the regulation of the constitution and capacities of juristic persons concern social interests and public order. They are therefore pre-eminently laws that cannot be admitted to possess any extra-territorial force: and a foreign juristic person, necessarily divested for this reason of the laws by which its constitution and capacities were originally regulated, must clothe itself with the territorial law<sup>2</sup>. To illustrate Laurent's theory, an instance may be given of the manner in which he applies it in practice. A provision is often found in treaties and laws confirming treaties which provide for the recognition of foreign juristic persons, that they shall, as a condition of recognition, observe the laws of the country by which they are recognised. This, he contends, must be construed in its literal sense. It applies to them not only that part of the territorial law which all foreigners must observe, but also the

<sup>1</sup> Laurent, vol. IV., p. 257.

<sup>2</sup> Laurent, vol. IV., p. 262.

whole of the rest of the territorial law, and in particular that part of it which regulates the constitution and capacities of domestic juristic persons. It thus denies them a personal law altogether<sup>1</sup>.

As in connection with the question of status, so here also, that part of Laurent's reasoning which is based upon the theory that public order and social interests are involved in all rules of law regulating the capacities of foreign persons is invalidated by its failure to distinguish between the two kinds of capacity possessed by every person, the civil and the functional. The latter may concern public order and social interests, but the former does not. To civil capacity, therefore, the argument has no application. Apart from this imperfection, his reasoning as to capacity is no doubt the logical outcome of his reasoning as to status. If the juridical differences between the personality of a natural and of a juristic person are so great that a juristic person is indeed not a person at all, it can scarcely have a personal law. Again, if it is necessary that a foreign juristic person should be expressly recognised in order that it may obtain personal status, such express recognition is, as has been seen, in reality a re-creation, and it is only natural that after re-creation the new creature should be regulated by the rules of law of the state to which it owes its fresh existence. Such reasoning however, whatever its theoretical validity may be, is open to an important practical objection. The capacities of a foreign juristic person must be ruled, it is said, by the territorial law. But the constitution of a juristic person, is determined once and for all at the time of its institution and in accordance with the laws of the state in which it is domestic: and the only capacities which it can exercise are those which it possesses in virtue of that constitution and that law. Now the constitution and the capacities of the juristic persons of no two states are precisely similar in character. In consequence, although it is possible, it is highly improbable that the capacities which a foreign person possesses in virtue of its original constitution and according to the laws of the state in which it is originally domestic would permit it to assume the constitution of a juristic person, even of similar type, of some other state, and to have a new character forced upon it in place

Public order  
and public  
policy.

<sup>1</sup> Laurent, vol. IV., p. 300.



of its original character. An English limited company, for instance, would be quite incapable of acting as a German *Aktiengesellschaft*, or as a French *Société Anonyme*: its directors would not have the necessary powers, its shares would not fulfil the necessary conditions, its methods of voting and many of its other internal activities would be irregular. Were any country, therefore, to enforce the principle that the capacities of foreign juristic persons must be governed by the territorial law, it would practically prohibit them from discharging any function or performing any legal act at all within its territories. The effect of Laurent's reasoning, in fact, is to take away with one hand what it gives with the other. Having admitted that foreign juristic persons can obtain personal status by means of an express recognition, he proceeds to impose upon them a condition precedent to their availing themselves of their status which it is impossible for them to fulfil.

Here, therefore, as in connection with his opinion about status, it may be said of his theory that it is neither satisfactory in logic nor expedient in practice. It may be noticed indeed that Laurent's hostility towards juristic persons betrays him into a self-contradiction. At another part of his work he argues that juristic persons "exist only as limited by the law of their existence, and if they are recognised in a foreign country, it is as persons limited and confined; beyond those limits they have no existence. It must be concluded therefore that the law restricting their capacities follows them everywhere<sup>1</sup>." He thus admits a foreign juristic person to the possession of a personal law (so long as it operates to its disadvantage) in a manner inconsistent with his own argument that the rules of law of its state of origin affecting its status and capacities cannot be allowed to have any effect abroad.

#### **A Foreign Juristic Person is capable of possessing a personal law.**

4. The theory which seeks to impose the territorial law upon foreign juristic persons is of interest as the strictly logical outcome of the theoretic basis of the restrictive system, which is the "fiction" theory. It is however commonly rejected, even

<sup>1</sup> Laurent, vol. IV., p. 274.

by those who go so far as to accept the necessity for an express recognition as a condition precedent to the enjoyment of personal status. Thus M. Weiss admits that, once recognised, a foreign juristic person is on an equality with a foreign natural person of the same nationality<sup>1</sup>, although he does so without explaining how a personal law can be enjoyed by something which is, according to him, essentially different from a person. It may be said indeed that, Laurent excepted, there is a general agreement that the foreign juristic person is capable of possessing and entitled to possess a personal law<sup>2</sup>. Differences, however, exist between the various reasons given for this opinion. Some reasons are better than others: it will be convenient to deal first with those less satisfactory.

System  
recognising  
the personal  
law of juristic  
persons.

### *Locus Regit Actum.*

The time honoured maxim *Locus regit actum* has sometimes been quoted to show that the law of the state of origin of a juristic person must be admitted in every other state to govern its constitution; and that the law of its place of constitution, as the *lex loci actus*, thus constitutes its personal law<sup>3</sup>. But to employ the maxim in this manner is to place too heavy a burden upon it. It can have no application except as to the form of the acts by which the juristic person is constituted. The formalities of its registration, or of the grant of its charter, or of the contract by which it is constituted, must no doubt in accordance with the maxim be governed by the law of the place where the acts in question were performed, and it is that law which must be referred to everywhere in order to decide whether they were duly performed or not<sup>4</sup>. But it does not follow that that law must decide also the legal content and consequences of such acts. The form, for instance, which is necessary, in order that the contract of association, contained in the memorandum of association of a Limited Company,

(a) *Locus  
regit actum.*

<sup>1</sup> Weiss, p. 397; *contra* de Martens, *Traité de Droit International*, vol. II., p. 428, maintaining that only treaties can decide.

<sup>2</sup> Cp. Stocquart, *Statut Personnel Anglais*, vol. I., p. 435; Fiore, § 321.

<sup>3</sup> "Amongst civilized nations the same freedom should be enjoyed by juristic persons that is enjoyed by natural persons. That is an application of the principle consecrated by the law of nations; *locus regit actum*." Vavasseur, *Clunet*, 1875, vol. II., p. 6; cp. also Vincent et Pénaud, § 8.

<sup>4</sup> Cp. Lyon-Caen and Renault, vol. II., p. 800.

may be legally valid, must be determined by the law of the place where that contract is made. But the interpretation of the contract and its general incidents may depend on some other law; and upon what other law they depend may be affected by a variety of circumstances, and in particular by the intention of the contracting parties. The maxim *Locus regit actum* can be applied to show only that the legality of the form of act by which a juristic person comes into existence must be referred to the *lex loci actus*. It cannot be applied to show that the legal content and consequences of that act must also be referred to that law; and it casts therefore no light upon the capacities of a foreign juristic person or upon the question whether it has a personal law or not<sup>1</sup>.

### *Notice and Agreement.*

It is sometimes said that a foreign juristic person must be recognised to possess the capacities conferred upon it by the law of its state of origin, and thus to have a personal law, because those who have entered into legal relations with it must have done so with knowledge of the nature of its capacities according to the foreign law, and with the intention that the foreign laws regulating its capacities should be adopted as an incident of the contract<sup>2</sup>. In certain judgments in the United States we find a development of this reasoning to the effect that the contracting party cannot be considered to have knowledge of the general rules of foreign law affecting the capacity of the foreign juristic person but only of the capacities conferred upon it by its charter and that a foreign juristic person cannot therefore rely for a defence upon an incapacity due to such a general rule of law<sup>3</sup>. From this it would follow that the personal law of a foreign juristic person is determined by its constituting documents only, and not by the rules of positive law of its state of origin unless it could be proved that the contracting party had express notice of those positive rules.

<sup>1</sup> Cp. Laurent, vol. iv., p. 270.

<sup>2</sup> "Every person who deals with a foreign corporation implicitly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorises. He is conclusively presumed to have contracted with a view to such laws of that government." *Canada Southern Railway Co. v. Gebhard* (1883), 109 U.S. at p. 537.

<sup>3</sup> See *Hoyt v. Thompson's Executor* (1859), 19 N.Y., p. 207.

A general objection to this reasoning is its limited applicability. Referring the possession of a personal law to notice and agreement, it applies only to legal relations resulting from contract, and it can be of no assistance in determining the question under other circumstances. It leaves us without any standard for determining, for instance, the capacity of a foreign juristic person to own property, where there can be no question of notice and the intention of an agreement. Objection may also be made to the manner in which the reasoning has been developed in the American decisions referred to on the grounds of its artificiality. When anyone contracts with a foreign juristic person his state of mind is probably not different from that in which he contracts with a natural person; he takes the other party to the contract for granted, and his intentions concern themselves wholly with the subject matter of the contract, and not at all with the question of capacities. Most probably he has no knowledge either of the constituting documents or of the rules of positive law by which the capacities of the juristic person are regulated; and there appears to be no practical reason to suppose that he is likely to be better informed about the one than about the other. The distinction between the two species is purely arbitrary and is without validity except as a possible means of distinguishing in a rough and ready manner between those rules of law regulating the juristic person's capacities in its state of origin, which affect the interests of the general public, and those which affect only the juristic person itself. In this connection, as will appear later on<sup>1</sup>, the distinction may be of some importance. The capacities of a foreign natural person, moreover, are regulated by the general rules of the foreign law; and yet it would not be contended that such general rules were not applicable to legal relations incurred by him abroad and resulting from contract unless the other contracting party had express notice of them.

### *Lex Loci contractus.*

The constitution of a juristic person, it is sometimes said, and consequently its capacities, which are determined by that constitution, is based upon a contract between its members. It is an accepted principle of private international law that a contract must be governed by the *lex*

(c) *Lex loci contractus.*

<sup>1</sup> Post, p. 96.

*loci contractus*, because it is to be assumed that it was one of the terms of the contract between the parties that it should be so governed. On this principle therefore the capacities of a foreign juristic person must be considered to be governed by the laws of its state of origin, in other words, it must have that law for a personal law.

This reasoning can be valid only in so far as it is used to determine the rights of members of the juristic person *inter se*. No inference can be drawn from it as to the rights of the juristic person and its members towards third parties. It is a term no doubt of the agreement between the members by which the constitution of the juristic person is regulated that the agreement is to be governed by some particular law, although not necessarily by the *lex loci contractus*; and as between themselves the term is valid and binding. But such a term can bind only the parties to the agreement. It cannot affect third parties with which the juristic person enters into legal relations, still less can it affect foreign states with whose laws the juristic person comes into contact. The intentions and agreements of the members of the juristic person amongst themselves provide no general basis for a claim to the possession of a personal law as regards the outside world.

### *Comity.*

By the lawyers of the United States the question of the capacities of foreign juristic persons is answered in the same manner as the question of their status. It has been  
(d) *Comity.* rather assumed than expressly decided by any process of reasoning that a foreign corporation, once admitted to personal status by means of the recognition to be implied from comity, possesses in consequence a personal law.

The reason for this assumption appears to be that the foreign laws regulating the constitution and capacities of the corporation are as much the subjects of comity as the foreign law which creates its existence. "In harmony," it is said, "with the general law of comity, obtaining among the states composing the Union, the presumption should be indulged that a Corporation of one State, not forbidden by the law of its being, may exercise within

any other state the general powers conferred by its own charter<sup>1</sup>." Again in the special case of capacity to contract, the rules of foreign law regulating that capacity in a foreign juristic person are said to be enforced in the courts of the United States by comity, in the same manner and for the same reason that the rules of foreign law governing the incidents of a contract are enforced by comity as the *lex loci contractus*. "If the obligation of contracts," it is said in an early case<sup>2</sup>, "as to this subject matter, is thus to be decided and enforced in our courts by reference to the laws of the country where made, justice and the comity of nations equally require that their obligation in relation to the contracting parties should depend on the same law and be enforced by our Courts accordingly. It is impossible to imagine a difference between the two cases." The principle finds its practical application in such well established rules of law as that which recognises that all controversies relating to the internal affairs of a foreign corporation, and all disputes between the incorporators as such, should be ruled by its domestic law, and that the courts of its state of origin only should exercise jurisdiction over them<sup>3</sup>, even when the territorial law expressly authorises suit against foreign corporations "for any cause of action<sup>4</sup>." It is unnecessary to repeat here the criticisms which have been already directed against this application of the doctrine of comity. It is enough to say that whatever objections there were to its validity in connection with the question of status apply also in connection with the question of capacity; and that as before, it seems as if the special implied recognition, said to

<sup>1</sup> *Christian Union v. Yount* (1879), 101 U.S. Rep., p. 352: "The power of a natural person to deal with his own is conceded by every civilized state—without reference to citizenship or domicile. But the power of foreign corporations so to contract necessarily involves in it an exertion of the power conferred on the artificial body by the sovereign creating it—it is therefore only on the principle of comity that corporations are allowed to make and take contracts." Thompson, § 7882; and cp. Morawetz, § 960; and Foelix, vol. I., § 31. Dicey apparently adopts the same view, in referring the claim of a foreign corporation to the general principle that "any right which has been duly acquired under the law of any civilized country is recognised and in general enforced by English Courts," Dicey, Rule 126 and General Principle, No. 1.

<sup>2</sup> *Bank of Marietta v. Pindell* (1824), 2 Rand. Rep. (Va.) at p. 473.

<sup>3</sup> Cp. *North State &c. Mining Co. v. Fields* (1885), 64 Md. at p. 154; *Richardson v. Clinton Wall Trunk &c. Co.* (1902), 181 Mass., p. 580.

<sup>4</sup> *Wilkins v. Thorne* (1883), 60 Md., p. 253.

be extended by comity to the foreign laws regulating the capacities of a foreign juristic person and to be necessitated by the assumption that its personality is fictitious, had a remarkably strong resemblance to the general legal process by which the personal law of a foreign natural person is recognised, and that the practical result at any rate is exactly the same in both cases.

*Assimilation of juristic persons to natural persons.*

Those who see no material juridical distinction between natural and juristic persons in private international law and maintain the doctrines as to status summarised in the preceding chapter under the heading of the liberal system, must necessarily maintain also that a juristic person is entitled to possess a personal law<sup>1</sup>. If a juristic person has a personality real in that sense at least in which the legal personality of a natural person is real, its claim to a personal law is as strong as that of a natural person. Although it has no physical characteristics, it has a character, derived from the legal and natural peculiarities of its constitution. The rules of the territorial law therefore must not be applied to its constitution and capacities any more than to those of a natural person, and for the same reason, that they cannot be so well adapted to it as those of its personal law, which constitute its character. It must be permitted to carry with it wherever it goes capacities regulated by the rules of law of its state of origin, which is the best judge of the capacities which it needs, and of the manner in which it should exercise them.

(e) Analogy  
with natural  
persons.

*Reservations in favour of the territorial law.*

5. Although a foreign juristic person is entitled to a personal law by which, and not by the territorial law, its constitution and capacities and their exercise must in general be ruled, it does not follow that it is therefore entitled to exercise in every foreign state every capacity that it possesses in its state of origin and in the same manner as

Sphere of the  
Territorial  
Law.

<sup>1</sup> Cp. Diena, p. 305; Sacopoulo, p. 120; Esperson, *Il Principio de Naturalità*; Lyon-Caen and Renault, p. 800; Despagnet, No. 61; Lainé, p. 283; Calvo, vol. II., p. 400; Weiss, vol. II., p. 447; Rolin, vol. I., No. 31; Niemayer, *Das in Deutschland geltende Internationale Privatrecht*, p. 69; Dicey, rule 128; Foote, p. 133; Corte App., Genova, judgment of 26th August, 1885 (*Annuario Critico di giur. comm. Indice decennale*, 1883-1893, p. 384, No. 414); Swiss Bundesgericht, judgment of 22nd July, 1887, Clunet, 1893, p. 240.

it can there exercise it<sup>1</sup>. It is obviously necessary that within certain limits it should be open to any state to subject a foreign juristic person to the rules of its territorial law, both the rules of its general law and the rules of its law of juristic persons in particular, for otherwise one state might by the multiplication of migrating juristic persons affect the whole social organism of another in a manner contrary to its interests. Where a state has expressly enacted which of the rules of its law are to apply to foreign juristic persons, such enactments are no doubt conclusive as regards the courts of the enacting states, even though the enactments disregard generally accepted principles of private international law. But they are not necessarily binding in other jurisdictions; foreign courts are entitled to inquire if they are in conflict with general principles, and if they are, to refuse to give them effect. As a matter of fact there has been little legislation of this nature, and in its absence it is necessary for the courts of any state to refer to general principles to determine even the law of their own state upon the matter. The final test for the courts of any state in deciding what part of the territorial law applies to foreign juristic persons is no doubt the intention of the local legislature. If it is clear that the local legislature intended that a particular rule of its law should apply to foreign juristic persons, then it does apply to them, however much the application may infringe the principles of a sound jurisprudence. But when no intention is expressed, it has to be implied from the nature of the rule of law in question, and some principle must then be sought for settling what sort of rules of law the legislature may reasonably be supposed to have intended to apply to foreign juristic persons. Now an intention which must be supposed to be present in every act of the legislatures of every state is the intention not to infringe the legitimate sovereignty of other states, but to apply its enactments to such persons and in such manner only as it can without committing any such infringement. Those rules only of the local law can have been intended to apply to foreign juristic persons which can be so applied without infringement of the legitimate sovereignty of their states of origin. To determine the sort of rules which is included in this category it is necessary only to consider that the peculiar business of each state is to protect and regulate the interests of

<sup>1</sup> Cp. Sacopoulo, p. 44; Von Bar, § 107; Brocher, p. 102; Dicey, *Law of Domicile*, p. 198.



its own subjects, and that it cannot legislate for the subjects of foreign states without infringing the sovereignty of the latter. Consideration of what may properly be implied to have been the intention of the legislature leads us therefore to the conclusion that the rules of the territorial law by which a foreign juristic person must be bound are those rules which relate to the interests of third parties, the subjects of the state, as distinguished from those which would relate to the juristic person itself, its constitution and character; while the rules of the personal law govern its constitution and character, and all its other legal relations. In practice most particular legislative restrictions of the capacity of individuals are enacted in the interests of the public at large, and foreign juristic persons must therefore be bound thereby<sup>1</sup>. By some jurists, and especially those of France, another form of expression is found for this principle. It is said that the foreign juristic person must observe all those rules of the territorial law which concern public order<sup>2</sup>. The latter expression which emphasises the difference between public and private law is however of little assistance to us in this country, where public order is an unknown legal quantity. The former, which emphasises the interests of individuals, the subjects of the state, is more in accordance with the spirit of the common law. There is however no true difference between the two expressions. Each is but an expression of the idea that a state must be supposed to have intended to apply to foreign juristic persons those rules of law only which affect matters which are for itself alone to regulate.

Such is the principle that must govern the courts of a state in determining the law of that state. It is equally applicable in determining the extra-territorial validity of the enactments of another state. If those enactments disregard the principle by applying to foreign juristic persons rules of the territorial law which do not relate to the interests of the subjects of the state, but to the juristic person itself, its constitution and character, then they have no extra-territorial validity, because they exceed the legitimate sphere of the legislative activity of a state.

<sup>1</sup> Cp. Morawetz, § 964; Calvo, vol. II., p. 223.

<sup>2</sup> Cp. Sacopoulo, pp. 70, 131; Pillet, pp. 183, 208; Despagnet, No. 61; Fiore, § 320.

An important application of this principle is to the interpretation of enactments which declare that foreign juristic persons must observe the law of the country, or any provision to the like effect. It follows in accordance with the principle that they must be construed as applying to foreign juristic persons, not all the rules of the territorial law, including the whole of its law as to juristic persons, but those only which are applicable to foreigners in general.

**The nature of the capacities which a Foreign  
Juristic Person can enjoy.**

In order to determine which of its capacities a foreign juristic person should be permitted to exercise on the same footing as a foreign natural person, it is necessary to call attention once more to the distinction between civil and functional capacity.

Nature of  
capacities of  
a Foreign  
Juristic  
Person.  
Functional  
Capacity.

*Functional Capacity.*

6. The recognition of the personal status of a foreign juristic person, and of its claim to a personal law, by no means necessarily includes its admission to the possession of functional capacity. Civil capacity it must be admitted to possess to some extent, or the recognition of its personal status would be illusory. But functional capacity can be denied whilst civil capacity is allowed. The former is not a purely juridical matter, but involves political considerations. It concerns social interests and in concerning them necessarily concerns the interests of third parties, the subjects of the state. It is therefore a matter in which the foreign juristic person must be subjected to the rules of the territorial law. From this the consequence is drawn by some writers that foreign juristic persons, with the exception of commercial associations, are never entitled to exercise their functions abroad until they have obtained express permission to do so. It does not appear necessary to adopt so stringent a conclusion. The same distinction between functional and civil capacities that applies to juristic persons applies to natural persons also, and yet natural persons are in general permitted to exercise their functional capacities abroad without any express permission to do so. Nobody would suggest that a French tutor in England

or an English tutor in France must, in the absence of any express provision to the contrary, obtain an official authorisation before teaching in a school. There are no doubt certain relevant differences between natural and juristic persons. Of natural persons there is only one general legal type: all states are acquainted with it, and can anticipate what sort of functions it will seek to perform and in what manner it will seek to perform them. But of juristic persons there are many types, the nature and purpose of any one of which may be quite unknown in states other than its state of origin: and a state can therefore have no certain knowledge what sort of functions a foreign juristic person which enters its territories intends to discharge, or what will be the consequences of permitting it to discharge them<sup>1</sup>. This difference however is rather a political than a juridical difference. It involves questions of policy which can only be dealt with by an express pronouncement from the legislature, and which should not be anticipatorily decided in either sense by a court of law. In the absence therefore of any express provision denying functional capacity to any foreign juristic person, or limiting its exercise, there is nothing to differentiate its juridical position in this respect from that of a foreign natural person, and, like a natural person, it should be permitted to exercise its functions without express authorisation. On the other hand it is legitimate for a state to deny functional capacity altogether to any foreign juristic person, or to impose any conditions or restrictions it pleases upon its exercise. It will be observed that the practice of English law is in accordance with this theory. It is certain that any foreign juristic person may exercise its functions in England except in so far as it is expressly prohibited or restricted.

The functional capacities of foreign juristic persons must be governed by the territorial law and the state may limit or prohibit their exercise. A common instance of such limitation or prohibition is where a state exacts from commercial associations the performance of certain formalities as a condition precedent to the right to carry on business within its territories: and it is therefore of importance to determine the effect of such a limitation or prohibition of functional capacity upon the civil capacity

<sup>1</sup> Cp. Moreau, p. 342.

of foreign juristic persons. To take a concrete instance; let us suppose that a foreign religious order is prohibited from keeping school or discharging any other of its functions in a certain state. Might it nevertheless sue and be sued there, and be recognised in general as a subject of rights? It has been maintained that it could not be so recognised; and in support of this contention an argument has been advanced which has been already considered in another connection. A juristic person, it is said, has by nature only those capacities which are necessary in order to enable it to discharge its functions; and without any function to discharge, it can have no capacities<sup>1</sup>. In other words, there is no true distinction between civil and functional capacity, because every act performed by a juristic person must necessarily contribute to some extent, however indirectly, towards the furtherance of its object in existence. To prohibit the exercise of functional capacity is therefore to prohibit that of civil capacity also. The foreign religious order, founded for a prohibited purpose, could not sue or be sued or be recognised as a subject of rights at all.

It is however generally agreed that this reasoning applies only to such prohibitions of an absolute nature as may be said to be intended to maintain a so-called universal public order or universal public policy, not the local public order or local public policy of a particular state only<sup>2</sup>. Where a state has prohibited the performance of certain acts on moral grounds which are generally accepted in civilised states, a juristic person, whose object in existence is to perform such acts, is deprived by that prohibition, not only of power to perform the acts in question within the territories of that state, but also of all civil capacity there. On this hypothesis, a gambling company, for instance, legally constituted under the laws of the Principality of Monaco, would be incapable of making a valid contract in England even for an indifferent purpose, such as the purchase of stationery for its Monaco office. There is in this country a recognised public policy against public gambling which is based upon general principles of morality, and not only upon the particular

(a) General and particular restrictions on functional capacity.

<sup>1</sup> Cp. Moreau, pp. 340—343.

<sup>2</sup> Lyon-Caen and Renault, vol. II., p. 802; *Cour Cass.* Judgment of 14 February, 1872, Sirey, 1872, 1, 321.

circumstances of this country. This public policy has the effect of prohibiting the exercise of the particular functional capacities with which alone the Monaco company is endowed. Every act in the law that it performs furthers that end to some extent; therefore it can perform no act in the law. Some acts no doubt contribute only indirectly to the prohibited purpose, but it is impossible to lay down any exact distinction between acts which contribute directly and those which contribute indirectly only. The one class blends into the other; all alike contribute to some extent; and so all are prohibited.

Where on the other hand a state has enacted a prohibition which concerns only its own particular interests, such as the prohibition to carry on some business of which the state has a monopoly, it is admitted that a juristic person which is thereby prevented from exercising its functional capacities within the territories of the state in question is nevertheless entitled to exercise civil capacity there: and, although it may not contravene the policy of the state by discharging its functions there, yet it may be recognised there as a subject of rights in respect of acts performed by it, and tending to promote the discharge of its functions, in other states<sup>1</sup>.

The best reason that can be given for the distinction is that a state when it prohibits the performance of some act because it is contrary to a general public policy, is considered to prohibit it in every state; and therefore an exercise of civil capacity within the state which must tend however indirectly to promote the performance of that act is affected by the prohibition, even though it can only tend to promote its performance abroad. On the other hand a state which prohibits the performance of some act because it is contrary to a particular public policy, prohibits it within its own territories only, so that an exercise of civil capacity which tends to promote its performance outside those territories is not affected by the prohibition. It is difficult however to justify the distinction thus drawn between general and particular public policies. It is admitted that for a state to refuse civil capacity to a foreign juristic person because its functions are contrary to its particular public policy would be an unjustifiable imposition on its part of its own policy in other

<sup>1</sup> Cp. Mamelok, p. 71; Lyon-Caen and Renault, vol. II., p. 805; Diena, p. 246 (note). Thus the French government in its capacity as owner of a tobacco monopoly in France may sue in Belgium to protect its trade mark. *Pasicrasie Belge*, 1877, 1, 54.

states. But there is no true distinction in this respect between the particular and the so-called general public policy. Each is but the policy of a particular state. For a state to prohibit the discharge of any function on any grounds in another state would be an unjustifiable interference on its part with the sovereignty of the latter. It is not entitled to assume that all other states share its own views about even matters of such common and general interest as gambling<sup>1</sup>. In order to state the theory it is necessary to admit the possibility of a juristic person existing for a purpose contrary to the so-called general public policy, and that alone shows that the policy is not general, because it is not accepted in the state in which that juristic person came into existence. Even if some general public policy were accepted by all states alike, the prohibition resulting from it in each state would apply in that state only, and not in other states: and therefore acts in the law in one state which tended to promote prohibited functions in another state only would not be invalidated by any prohibition in the former state<sup>2</sup>.

It is also difficult to explain why prohibitions which are otherwise similar should have different effects because they were enacted from different motives. The prohibition based on a general public policy and that based on a particular public policy both consist of a denial of functional capacity; both have the same juridical content; and it would be artificial to hold that one has a more extended effect than the other.

The true objection however to the reasoning which makes civil capacity depend on functional capacity is more fundamental. It

(b) The relation between functional and civil capacity.

disregards the essential similarity between natural and juristic persons in private international law. Nobody would contend that to prohibit a natural person from exercising his functions deprives him of civil capacity. An anarchist is not an outlaw; and a Jesuit in Switzerland may sue and be sued and contract and own property, although it is forbidden him to fulfil his purpose in life, the furtherance of the objects of the Society of Jesus. That is because the natural person, however much he may concentrate his whole activity upon some particular social mission, has yet a real existence apart from his mission, and because even when he is deprived

<sup>1</sup> Cp. *Saxby v. Fulton* (1909), 2 K.B., p. 208.

<sup>2</sup> Cp. *Lyon-Caen and Renault*, vol. II., p. 802.

of his mission he is still a person. In the same manner a juristic person, even when it is forbidden to exercise its functions, is still a person. The real elements in its nature cannot be destroyed by a prohibition. They remain in existence, and the juristic person continues capable of exercising civil capacity, in so far as that exercise does not infringe on the prohibition in question.

Nor is it necessary to hold that every exercise of civil capacity involves an exercise of functional capacity, and if the functional capacity is prohibited, infringes on the prohibition. There are many cases in which it is easy to distinguish between acts which do promote the objects of the juristic person and acts which do not promote them, and in which the distinction is far from artificial. Some juristic persons can perform acts in the law which have no relation at all to their proper functions. The function of the Order of St Benedict, for instance, is, presumably, to forward some religious purpose; a function with which contracts for the sale of liqueur do not appear to be connected even indirectly. Other juristic persons exist which seem to have no defined functions: it would be difficult to define the precise purposes in existence of the City Companies. Conversely juristic persons can perform acts in discharge of their functions which are not acts in the law. Thus, when the servants of a mining company dig, or the members of a religious order teach, they are exercising the functional capacities of the respective juristic persons, but they are exercising no civil capacity, for they are not performing acts in the law. The acts in question are in the one case an exercise of civil capacity only, in the other they are an exercise of functional capacity only, and there can be no reason why the prohibition of one class of acts should affect the validity of another and a distinct class. But there is no doubt a border-land in which it is impossible to say that the act in question is an exercise of functional or of civil capacity only. This is particularly the case with commercial associations which have no plant. An insurance company, for instance, discharges its functions by the performance of various acts in the law, and in particular by means of contracts. The exercise of its functional capacity consists of the repeated exercise of its civil capacities, and the performance of one is necessary to the performance of the other. But even in such cases as these it does not follow that every single exercise of civil capacity is necessarily an

exercise of functional capacity: and whether a single exercise of civil capacity amounts to an exercise of functional capacity also is a question of fact which must depend upon the circumstances of the case. In the United States, for instance, it has been decided that the performance of a single isolated act such as the making of a single contract by a foreign corporation, does not amount to carrying on business<sup>1</sup>, and that even such an important exercise of civil capacity as the acquisition of real estate does not necessarily amount to an exercise of functional capacity<sup>2</sup>. But even when a particular exercise of civil capacity is undoubtedly an exercise of functional capacity also, it is clear that the act in question has two qualities, its quality as an exercise of functional capacity, which is partly a political quality, and its quality as an exercise of civil capacity, which is purely a juridical quality. The prohibition applies to the act in respect of its former quality only: and the act retains its latter quality although, in respect of the prohibition attached to the former, it may not be permitted to be effective. Although, therefore, it may be impossible to distinguish in all cases between acts which are an exercise of civil capacity only, and acts which are an exercise of functional capacity only, yet it is possible always to distinguish between these two qualities of the same act. A prohibition or limitation of functional capacity applies only to one quality and not to the other, and leaves the other in existence, although in the particular case it may be deprived of effect. Exclusion from functional capacity does not therefore exclude from civil capacity. Even if in the case of some particular juristic person every act that it could perform must necessarily be an exercise of its functional capacities, yet the prohibition of these would leave its acts in virtue of their qualities as exercises of civil capacity not absolutely null, although deprived of effect. The distinction is not purely academic. In the United States it has found a practical application. An act in the law performed

<sup>1</sup> *Frawley v. Pennsylvania Casualty Company* (1903), 124 Fed. Rep. at p. 264; cp. *Hunter v. Mutual &c. Insurance Co.* (1911), 218 U.S. Rep., p. 573; *International Textbook Co. v. Pigg* (1910), 217 U.S. Rep., p. 91; *Western Union Telegraph Co. v. Kansas* (1909), 216 U.S. Rep., p. 1; and see *Murfree, op. cit.*, §§ 66—73.

<sup>2</sup> "The holding of real estate in other states, in their corporate name, is no more the exercise of their corporate functions, than is bringing a suit in their corporate name, which is now a right not controverted." *New York Dry Dock v. Hicks* (1850), 5 McLean, p. 111; cp. also *State v. Boston &c. Railway Co.*, 25 Vt., p. 433.



by a foreign corporation in contravention of an express statutory limitation of its capacities, or by a foreign corporation which owing to its failure to perform some condition precedent has no functional capacity, is held to be valid as against private litigants, on the grounds that to enforce such enactments is the business of the public authorities alone<sup>1</sup>.

The inquiry as to the functional capacities and that as to the civil capacities of a foreign juristic person are not related to each other. They depend on different considerations, and the determination of one does not assist in the determination of the other. A foreign gambling company may be able to sue a debtor in England although it may not run a casino. A state is entitled to place any restrictions it pleases upon the exercise of its functions by any foreign juristic person: but since those restrictions apply to its acts only in respect of their quality as a discharge of its functions, we can deduce therefrom no general conclusions as to the extent of the civil capacities which the foreign juristic person in question can exercise. The nature of the public policy or enactment which prohibits the exercise of certain functions by a foreign juristic person is to prohibit certain acts in respect of a certain quality which they possess: and that being so they leave unaffected other acts of the foreign juristic person which do not possess that quality, including acts in the exercise of the prohibited functions outside the territories of the prohibiting state, and acts in the exercise of civil capacities only even within those territories, although the general functions of the juristic person performing them may be prohibited<sup>2</sup>. In accordance with this

<sup>1</sup> "The private citizen is not the party to enforce these Corporation laws, nor is the nullification of his contracts or of acts done in performance thereof the true remedy for their violation. The State alone is authorised to enforce them," *Blodgett v. Lanyon Zinc Co.* (1903), 120 Fed. Rep. at p. 896; and cp. *Steam Boat Co. v. McCutcheon and Collins* (1850), 13 Pa. at p. 15; *Cowell v. Springs Co.* (1879), 100 U.S. Rep. at p. 60.

<sup>2</sup> Cp. *Lyon-Caen and Renault*, p. 805; *Von Bar*, p. 235; *Diena*, p. 244; *Lainé*, p. 299; *Resolutions of the Institute of International Law*, 1891, Art. III., "Les sociétés par actions qui établissent des succursales ou sièges d'opérations dans un pays étranger doivent y remplir les formalités de publicité prescrites par les lois de ce pays. Le défaut d'accomplissement de ces formalités ne rend pas nulles les opérations faites par les succursales, mais les administrateurs et représentants des sociétés peuvent être déclarés responsables d'après la loi du pays où la contravention a été commise, de toutes les opérations faites dans ce pays." Cp. also *Resolutions of the International Congress of Joint Stock Companies*, Paris, 1889, Art. 25, "Dans les cas où des conditions seraient exigées d'une société étrangère pour être admise à contracter et à agir en justice dans un pays, l'inobservation de ces conditions ne devraient pas entraîner la nullité des opérations."

view, it has been held in the United States that a foreign company, which has no right to carry on business because it has not complied with certain statutory conditions precedent to the right, is nevertheless not an outlaw. It may sue for and recover property<sup>1</sup> and insure it<sup>2</sup>, foreclose a mortgage<sup>3</sup>, sue upon a note<sup>4</sup>, and recover taxes overpaid<sup>5</sup>.

But it does not follow that every juristic person is entitled to enjoy civil capacity in a state, however repugnant its purpose in existence may be to the local public policy. The state may expressly refuse to recognise its personal status: or it may well be that some public policies, such as those relating to public morals, are of such a nature as to make it necessary to assume that personal status is denied to all foreign juristic persons whose purpose in existence is contrary to them. In either case, the foreign juristic person having no personal status, can have no civil capacity. But the public policy has then the effect of excluding the foreign juristic person from civil capacity, not because it denies it functional capacity, but because it denies it any personal status.

It is generally agreed that commercial associations are entitled to exceptionally favourable treatment in this connection.

(c) Capacities  
of commercial  
associations.

The pursuit of commerce is a function which is beneficial to all states, and contrary to the policy of none. In commercial associations, moreover, where the object of association is private gain and not the public welfare, the substratum of natural persons is more apparent than in any other class of juristic person. It must accordingly be admitted that in virtue of these circumstances they need no special authorisation to entitle them to exercise their functions; and that the reasons which make it legitimate for a state arbitrarily to refuse to admit other juristic persons to the exercise of functional capacity do not apply to them. Functional capacity should therefore always be conceded to them<sup>6</sup>. But it is

<sup>1</sup> Witley v. Clark Gardner Lode Mining Co. (1878), 4 Colo., p. 369.

<sup>2</sup> Tabor v. Goss Manufacturing Co. (1885), 18 Pac. Rep., p. 537.

<sup>3</sup> North West Insurance Co. v. Brown (1886), 36 Minn., p. 108.

<sup>4</sup> Fuller and Johnson Manufacturing Co. v. Foster, 30 N. W. Rep., p. 166.

<sup>5</sup> Powder River Cattle Co. v. Custer County (1890), 22 Pac. Rep., p. 383, s.c. 9 Mont., p. 145.

<sup>6</sup> "Ordinarily unless restrained by the Local Law, a foreign Corporation may carry on the business for which it was chartered," Murfree, § 21, and American cases there cited. "The reason for exclusion fails when applied to matters of mere ordinary business," Wharton, *Conflict of Laws*, § 105 a.

nevertheless open to any state to impose restrictions upon the concession so long as those restrictions are confined to provisions for the protection of the interests of third parties, the subjects of the state, and do not seek to affect the constitution and character of the juristic person, or the relations of its members *inter se*. The latter must be left to the personal law, and to exact from a foreign commercial association the performance of conditions precedent to leave to exercise its functions which would affect its internal constitution, would be improperly to disregard its personal law, and practically to deny it personal status.

The function of a commercial association is to carry on some business, and its functional capacity is its capacity to carry on business. When a state imposes upon foreign commercial associations conditions precedent to the enjoyment by them of a right to carry on business, it follows from what has been said that not all foreign commercial associations which desire to perform any act in the law within the territories of that state must necessarily perform the conditions precedent before doing so, or that any act in the law performed by a foreign commercial association that has not performed the conditions precedent is necessarily avoided or otherwise affected by the non-performance. Whether the performance of such an act does or does not amount to a carrying on of business, is, as it has been seen, a question of fact. If it does amount to a carrying on of business, then the provisions of the enactment enforcing the conditions precedent apply, and the act in question is avoided or penalised in the manner provided for: if it is not a carrying on

(d) What is  
"carrying on  
business"?

of business, then it is valid as a simple exercise of the civil capacity to which the foreign commercial association is *prima facie* entitled. It becomes therefore of importance to ascertain what amounts to a carrying on of business by a foreign commercial association. This is essentially a question of fact and not of law; but a circumstance which provides an adequate and convenient test, and one which has been widely adopted in positive legislation, is the possession by the foreign commercial association of a branch office within the territory. A foreign commercial association having such an office is generally recognised itself to be present within the territory, and to be subject to the jurisdiction of the local courts. It has come within the territory, and it is natural to suppose that it has come there for the purpose of carrying on business. The only positive

enactment of our law dealing with foreign commercial associations in a general manner is an example of this policy. Section 274 of the Companies (Consolidation) Act 1908 (originally Section 35 of the Companies Act of 1907) requires that foreign companies which carry on business here should perform certain formalities, but it applies to those companies only which have a 'place of business' here. A foreign commercial association which desires to establish a branch office within the territory of a state which has adopted this policy must perform the conditions precedent before doing so, but one which does not desire to establish a branch office need not perform the conditions precedent, and may yet exercise its civil capacities by performing acts in the law<sup>1</sup>.

The legal effect of an act performed by a foreign commercial association which is carrying on business without having performed the conditions precedent is in the first place a question of the interpretation of the enactment by which the conditions precedent are imposed. But it follows also from what has been said as to the difference between functional capacity and civil capacity, that as far as concerns the effect of the enactment imposing the conditions precedent to the right to carry on business, any act in the law performed by a foreign commercial association to which the enactment applies is *prima facie* valid in virtue of its quality as an exercise of civil capacity, and that it is only void in so far as the enactment contains a positive prohibition of the act in virtue of its quality as an exercise of functional capacity<sup>2</sup>.

### *Civil Capacity.*

7. It is generally admitted that a foreign juristic person, in virtue of its personal status, is entitled at least to a certain minimum of capacity, including those particular capacities to which foreign natural persons are in general entitled, and to which it is to be presumed, in the absence of any reason to the contrary, that foreign juristic persons are entitled also. It is undoubtedly in

Nature of capacities of a foreign juristic person : Civil Capacities.

<sup>1</sup> Cp. Diena, p. 285 ; Asser and Rivier, II. 99.

<sup>2</sup> "We ought to recognise the existence, at least as a corporation *de facto*, of a foreign commercial society before it fulfils the formalities prescribed by the Italian Law, according to the manner in which it has definitely obtained a legal existence abroad, and the effect of the observation of the said formalities is to protect the rights of third parties, and certainly not to give life to a being which had already a juridical life of its own," Diena, p. 244.

the power of any state to restrict these capacities in any manner it pleases<sup>1</sup>, such as a restriction upon the capacity to hold real estate, just as it may modify the position of foreign natural persons by legislating against some particular class, such as Jews. Particular restrictions of this nature do not affect the character or constitution of the juristic person, or the relations of its members *inter se*. Their purpose and effect is to protect the interests of the general public. They are therefore within the legitimate sphere of legislation of a state, and entitled to universal validity. Apart from the sanctions of public international law, the only restrictions for a state to observe in enacting them are, firstly, that if in its legislation it disregards the fact that a foreign juristic person has a natural personal status, if it seeks unduly to exclude it from civil capacity for the sole reason that it is not a natural person, it will be legislating in disregard of the nature of things; and secondly, that for a state to interfere, or to reserve power to interfere, by way of restriction with a foreign juristic person after it has once recognised its status and its title to the enjoyment of personal law must produce a feeling of instability very harmful to commercial associations.

It is generally admitted that a foreign juristic person must be recognised to possess at least the following capacities.

### *Capacity to sue.*

This is not so much a right as the means of realising rights. To deny it would be to deny, for instance, that a German manufacturing company can sue in an English Court for the price of goods sold and delivered in Germany to a domiciled German who had subsequently migrated to England. Without it a foreign juristic person would have no means of protecting itself: and its admission to personal status and to the exercise of capacities in virtue of such status would be illusory. Capacity to sue stands therefore on a footing different from that of other capacities. It is the only necessary concomitant of personal status<sup>2</sup>. Recognition of personal status

<sup>1</sup> Von Bar, § 107; Sacopoulo, p. 44; Wharton, *Conflict of Laws*, § 105; Weiss, p. 397; Lainé, pp. 300, 308; Haladjian, p. 52; Fiore, § 322.

Cp. Thompson, § 7977.

implies recognition of capacity to sue, and conversely recognition of capacity to sue implies recognition of the suitor's status as a person.

*Capacity to be sued.*

It has been argued that the enjoyment of capacity to sue by foreign juristic persons depends on their voluntary consent to the jurisdiction of the local courts, and that in the absence of such consent they are not capable of being sued. It appears more reasonable however to consider that the one is a necessary corollary of the other, and that if a foreign juristic person is to enjoy the privilege it must accept the corresponding liability also<sup>1</sup>. There is nothing to differentiate its position from that of a natural person, in whose case no consent is necessary. It would be ridiculous that, although permitted to be plaintiff in an action, it should be protected from being sued by way of counter-claim, or from being condemned to pay costs if unsuccessful: and there is no difference in principle between its position under such circumstances, and that which it occupies as defendant in original proceedings<sup>2</sup>. The liability to be sued includes, of course, the right to defend. As it has been said

<sup>1</sup> Cp. *March v. Eastern Railway Co.* (1860), 40 N.H. at p. 577.

<sup>2</sup> (a) and (b) together make up the "*droit d'ester en justice*" which is generally conceded to foreign juristic persons; cp. Savigny, vol. II., § 92 (5); Laurent, vol. IV., p. 279; Haladjian, p. 50; also *Portsmouth Livery Co. v. Watson* (1813), 10 Mass., p. 96. So Rattigan, p. 44, "for the purposes of justice such juristic persons must be permitted to have the rights of suing and being sued"; Lindley, *Company Law*, 6th ed., p. 1221, "it is an established rule of international law that a corporation duly created according to the laws of one state may sue and be sued in its corporate name in the Courts of other states." Story, § 565; and Kent's *Commentaries*, vol. II., p. 284; cp. also Resolutions of the Institute of International Law, 1897, concerning the capacity of foreign public juristic persons; in Resolution 1 it was resolved that these should be recognised to possess personal status. The Resolutions then proceed, "(2) In consequence, foreign public juristic persons can sue and be sued before the tribunals of all states, by the intervention of their ordinary representatives. They are represented in the acts of civil life according to their natural law"; and Resolutions of the Institute of International Law, 1891, concerning conflicts of law relating to joint stock companies, "Art. 1. Les sociétés par actions constituées conformément aux lois de leur pays d'origine, ont, sans qu'une autorisation générale ou spéciale leur soit nécessaire, le droit d'ester en justice dans les autres pays." This resolution was subsequently adopted also by the International Congress of Joint Stock Companies held at Paris in 1900; cp. Resolutions of International Congress of Joint Stock Companies, Paris, 1889, "Art. 23. Une société par actions régulièrement constituée dans un pays doit pouvoir contracter et agir en justice et faire des opérations dans un autre pays sans être astreinte à observer des conditions particulières."

"wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognised as such by the common intelligence and conscience of all nations<sup>1</sup>."

*Capacity to acquire, hold, and transfer property.*

What has been said about capacity to sue applies in an almost equal degree to these capacities. The right to own property, says Savigny, "is an essential right to the possession of which every person must be admitted<sup>2</sup>."

(c) Capacity  
for owner-  
ship.

To recognise the personal status of a foreign juristic person would be of little benefit to it if it were to be denied capacity to hold property. The possession of this capacity is also consequential upon the capacity to sue, because the latter would be illusory if the suitor were incapable of holding the proceeds of his suit. As to capacity to hold any particular kind of property, such as land and other immoveables, this, as will be seen, depends on any express limitations imposed by the territorial law, or by the personal law.

*Capacity to Contract.*

It cannot be said that this capacity is a necessary consequence of the recognition of personal status in the same manner as capacity to sue is. It is however inseparably connected with the capacities to acquire, hold, and transfer property, because without it the latter could not be exercised<sup>3</sup>. For these reasons, and because it is not denied to foreign natural persons, it should not be denied to foreign juristic persons<sup>4</sup>.

(d) Capacity  
to Contract.

The principles which define the extent to which the capacities of a foreign juristic person are subjected to the territorial law in general have been already discussed. It only remains to apply them here in greater detail. The capacities of a foreign juristic person are subject to the following limitations.

<sup>1</sup> per Field, J., in *Winslow v. McVeigh* (1876), 93 U.S. Rep. at p. 277; cp. Thompson, § 7989; Morawetz, § 961.

<sup>2</sup> Savigny, vol. II., § 91; cp. also Lainé, p. 207; and Laurent, vol. IV., No. 137.

<sup>3</sup> Cp. Diena, p. 293, § 41.

<sup>4</sup> Cp. Mamelok, p. 79; Kent's *Commentaries*, p. 288; Von Bar, § 106; Haladjian p. 50.

*Limitations on the capacities of a foreign juristic person.*

8. (a) A foreign juristic person has no other capacities than those which it possesses according to its personal law; it cannot obtain wider capacities because the territorial law allows such wider capacities to its domestic juristic persons of the same type<sup>1</sup>. Its admission to the enjoyment of a personal law means that it is recognised to possess everywhere the character given it by its original constitution. To permit it to alter that character by assuming fresh capacities or to seek to alter it by forcing fresh capacities upon it by express enactment would be improperly to disregard its personal law and to impose upon its constitution the rules of the territorial law in a manner which would amount to a denial of its original status as a person. Moreover, the state of origin is presumably the best authority as to what capacities are necessary in order to enable it to perform its functions<sup>2</sup>.

It follows that the courts of its state of origin are the proper authorities to pronounce upon the extent of its capacities. As has been said in the United States, "where the tribunals of the creating state have adjudicated on the extent of the franchise possessed by such corporation, a proper spirit of comity requires that such adjudication should conclude the question of the amount of its charter privileges in the foreign *forum* in which it is a suitor<sup>3</sup>."

(b) It is subject to any general or particular restraints upon capacity imposed by the territorial law upon all natural persons or all foreign natural persons<sup>4</sup>. Claiming the privileges of personality on the same footing with foreign natural persons, it must submit to the restrictions which are imposed upon them.

(c) It is subject to any particular restraints upon capacity imposed by the territorial law upon its domestic juristic persons of the same type<sup>5</sup>. Both these restraints and those referred to

<sup>1</sup> Cp. Mamelok, p. 76; Weiss, p. 398; Pillet, p. 206; Dudley Field, § 545.

<sup>2</sup> Cp. Mamelok, p. 80; Diena, p. 308; Von Bar, § 107.

<sup>3</sup> Bank of Kentucky v. Schuylkill Bank (1846), 1 Pars. Sel. Eq. Cas., p. 180, at p. 226.

<sup>4</sup> Cp. Diena, p. 308; Fiore, § 322.

<sup>5</sup> Cp. Mamelok, p. 76 et seq.; Asser and Rivier, p. 202; Resolution of International Congress of Joint Stock Companies, Paris, 1900, No. 23 c: "quand dans un



in the last paragraph, being rules of law enacted to protect the interests of the public, subjects of the state, must be treated as qualifying and limiting the personal law. It is subject in particular to restrictions imposed by the territorial law upon the capacity of all persons or all foreign persons, natural or juristic, to acquire, hold and transfer land or other immoveable property<sup>1</sup>.

This is but a particular instance of the general rules stated in paragraphs (b) and (c), but it is one of special importance. On account of the intimate connection between the ownership of immoveables and the social organisation of a country, and the consequent jealousy with which questions relating to the former are reserved for the territorial law, their acquisition and ownership by foreign juristic persons may properly be made the subject of express regulation by the state<sup>2</sup>. It is common to find an enactment expressly restricting or regulating the exercise of such capacities as these, at least by juristic persons other than commercial associations. The English mortmain acts are an example of the manner in which states have found it necessary to interfere to prevent the stagnation of the means of production in the grasp of the dead hand, and to protect the charitable, and their families, from the consequences of their own rash generosity.

But in the absence of such enactments the personal law alone is the standard to which the question of capacity must be referred. Capacity to acquire, hold or transfer immoveables has no specific difference in this connection from other capacities. In the United States, for instance, it is well recognised that in the absence of any express enactment or public policy to the contrary<sup>3</sup>, a foreign juristic person's capacities in any state in respect of rights of property in real estate are to be determined by its personal law<sup>4</sup>.

pays, les sociétés anonymes sont soumises à raison de la nature de leurs opérations, à des règles spéciales (autorisation du gouvernement, dépôt d'un cautionnement &c.) les mêmes règles doivent être appliquées aux sociétés anonymes étrangères ayant ces opérations pour objet."

<sup>1</sup> Cp. Resolutions of the Institute of International Law, 1897, arts. 3, 4 and 5, *Annuaire de l'Institut de Droit International*, vol. XVI., p. 307.

<sup>2</sup> Cp. Opinion of the Faculty of Law of Berlin on the Zappa affair, Clunet, 1893, p. 727.

<sup>3</sup> Cp. *Cowell v. Springs Company* (1879), 100 U.S. Rep. at p. 59.

<sup>4</sup> Cp. *Christian Union v. Yount* (1879), 101 U.S. Rep., p. 352; *Steamboat Co. v. McCutcheon and Collins* (1850), 13 Pa. at p. 15; Thompson, § 7913; Blodgett

Thus a foreign juristic person can exercise those capacities only (a) which it possesses according to its personal law and (b) upon which the territorial law imposes no restrictions in relation to all persons or all foreigners, or (c) in relation to domestic juristic persons of the same type<sup>1</sup>.

9. It must next be considered to what extent particular restrictions upon capacity imposed upon a juristic person in its state of origin are part of its personal law, and apply to it in other states also. The same principle applies to this matter

v. Lanyon Zinc Co. (1903), 120 Fed. Rep., p. 893; Kerr v. Doughty (1880), 79 N.Y., p. 327. In Boyce v. City of St Louis (1859), 29 Barb. at p. 652, it was said by Sutherland, J., (following Birtwhistle v. Vardill (1840), 7 Cl. and F., p. 895), that "it is necessary to advert to the principle of the common law that a title or right in or to real or immoveable property can be acquired, enforced or lost, only according to the law of the place where such property is situated, the *lex rei sita*. This principle applies as well to the capacity of the claimant to take or hold the real estate. If the claimant is a foreign corporation claiming as devisee, then not only the capacity of such corporation to take and hold real estate as devisee, but its capacity by its charter, is to be determined by the law of the situs." It appears, however, that the learned judge did not intend that the rules of the personal law as to the foreign corporation's capacity to hold immoveables must be displaced by the rules of the law of capacity of the *rei situs*, and that when he says the capacity of the foreign corporation "is to be determined by the law of the situs" he means only that it is to be determined by the courts of the situs. His attention is turned rather to the question of jurisdiction than to the question of what rules of law are applicable, and his final conclusion from these premises is only that "of course it belongs to the courts of the state or country where the real estate is situated, to declare and apply the law on the question of the capacity or right of the claimant."

<sup>1</sup> Cp. Lindley, *Company Law*, 6th ed., p. 1226, "The transactions of a corporation are governed, not by the law of the state creating it, but by the law of the place where they occur, and by the constitution"; Dicey, Rule 129, "The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the laws of the country where the transaction occurs"; Story, p. 175, Bigelow's note, "Power to act depends both on the law of the country where the Corporation was created and of that where it assumes to act"; Kent's *Commentaries*, 12th ed., p. 285, note (a), "A Corporation in one state or country may not only sue but may make valid contracts in another, provided their charter warrants such contracts, and there is no *positive* disability by statute in the state where they are made"; Gillespie's note, Von Bar, p. 242, "The powers of the Corporation, the limits of its legal capacity must be determined by reference to a double canon: first, its power as defined by its constitution, and second, by reference to the law of the country, where it proposes to exercise its powers"; N.Y. Floating Derrick Co. v. New Jersey Oil Co. (1856), 3 Duer. (N.Y.), p. 648, "A Corporation can do acts abroad unless expressly restrained by charter or by the laws of the Foreign Country. Such restriction is not presumed but must be shown." Cp. also American Waterworks Co. of Ill. v. Farmers' Loan and Trust Co. (1896), 73 Fed. Rep., p. 956; Merrick v. Brainard (1866), 34 N.Y., p. 208; Silver Lake Bank v. North (1820), 4 Johns Ch., p. 370; Hoyt v. Thompson's Executor (1859), 19 N.Y., p. 207.

that has been referred to in considering the particular restrictions imposed upon capacity by the territorial law which apply to foreign juristic persons to the exclusion of the personal law. If the restrictions were intended to form part of the character and constitution of the juristic person, then they are part of its personal law, and it is bound by them even in respect of legal relations contracted in a state in which no such restrictions are imposed : but if the restrictions were enacted in the interests of the public only, and not as part of the character and constitution of the juristic person, then they do not form part of its personal law, and it is not bound by them in respect of legal relations contracted in other states in which no such restrictions are imposed. Otherwise an enactment, intended to benefit the public in one state, might have the effect of injuring the public in another : because persons ignorant of the restriction might find their contracts, for instance, invalidated by a foreign law of which they could not be expected to have any knowledge.

This principle may be justified by reference to the intention of legislatures, express or implied. We have here the converse of the principle already stated as to the intention to be implied on the part of the legislature as to the application of the territorial law to foreign juristic persons. Just as it must be presumed that the territorial law of a state is intended by the state to apply to foreign juristic persons only in so far as it concerns the interests of its own subjects ; so it must also be presumed that the laws of the juristic person's state of origin which relate to the interests of members of the public, subjects of that state, were not intended to apply to it in its relations with the subjects of other states. Neither the positive law of a foreign juristic person's state of origin, nor its charter, can have intended that particular restrictions or conditions which were imposed upon its capacities, not in relation to its constitution or to the relations of its members *inter se*, but only for the purpose of protecting the interests of the public, should continue to affect it outside its state of origin. The protection of the interests of members of the public is the business of that state only of which they are citizens ; and one state cannot have intended to interfere with another state's business, or in other words, to infringe its sovereignty. If it has expressed such an

Limitations on capacity of the personal law.

(a) Legisla-  
tive intention.

intention in its legislation, the expression cannot be entitled to any extra-territorial validity.

As an illustration of the principle in question, an American decision may be quoted, to the effect that a provision of a New York statute that "no devise of real estate to a corporation shall be valid unless such corporation be expressly authorised by its charter or by statute to take by devise," does not incapacitate a New York Company from taking real estate by devise in other states<sup>1</sup>. This is a statute passed for the protection of testators and their families : its subject matter is primarily wills and lands, and not corporations ; and its application is therefore territorial only : it is not part of the personal law of the corporations which it affects. Thus also it has been decided in several cases that a foreign corporation is bound by a contract which by its charter it had no capacity to make, no such restriction on capacity being known to the territorial law : a sale of railway bonds, for instance, was upheld, although made in contravention of a provision in the charter of the railway company as to the price of sale of such bonds<sup>2</sup> ; and it has been decided that a Pennsylvania corporation can hold land in Kansas, although a Pennsylvanian statute prohibits it from doing so in Pennsylvania without licence<sup>3</sup>.

In practice provisions for the protection of the public are generally to be found rather in the general rules of positive law and in particular in those affecting the capacities of all persons alike, natural and juristic, than in the charters of juristic persons : and there is therefore some justification for a theory put forward in several American decisions, to which reference has already been made<sup>4</sup>, that while knowledge of the provisions of the charter of a foreign corporation will be imputed to one dealing with a foreign corporation, he is not presumed to

<sup>1</sup> *Thompson v. Swoope* (1855), 24 Pa., p. 474 ; see also *American Bible Society v. Marshall*, 15 Ohio, p. 537 ; and *Bank of Louisville v. Young*, 37 Mo., p. 398 (limitation upon amount of interest chargeable for a loan) ; *con. Starkweather v. American Bible Society* (1874), 72 Ill., p. 51 ; s.c. 22 Am. Rep., p. 133.

<sup>2</sup> *Ellsworth v. St Louis &c. Railway Co.* (1885), 98 N.Y., p. 553 ; also *City Fire Insurance Co. v. Carriage* (1871), 41 Ga., p. 660 ; and *Bank of Chillicothe v. Dodge* (1850), 8 Barb., p. 233 ; *contra, Rue v. Missouri Pacific Railway Co.* (1888), 74 Tex., p. 474 ; s.c. 15 Am. St. Rep., p. 852.

<sup>3</sup> *O'Brien v. Wetherell* (1875), 14 Kan., p. 616 ; and see *Whitman M. Co. v. Baker*, 3 Nev., p. 386.

<sup>4</sup> *Ante*, p. 72.

know the laws enacted by the foreign sovereignty; and that in consequence a conveyance by a New Jersey corporation, which was insolvent at the time, could not be impeached on the ground that a general statute of New Jersey declares transfers by insolvent corporations void as against creditors without showing actual notice of the law<sup>1</sup>. But the distinction seems rather empirical than logical.

It must be emphasized that what has been said as to the release of a juristic person from restrictions imposed upon it in its state of origin applies only to restrictions imposed in the interests of the public. A restriction imposed upon the juristic person as a part of its constitution and to determine its character, and in relation to the interests of the juristic person itself and of its members *inter se*, is part of its personal law of which it cannot rid itself. Such a restriction affects the status of the juristic person: and a foreign state cannot disregard it by attributing to a juristic person the capacity denied to it by the restriction without disregarding its status as a person, and in effect requiring of it that it should become another person, which it may be unable to do: nor, for the same reason, can the juristic person voluntarily assume the capacity originally denied it<sup>2</sup>. The contract of constitution into which the members entered contemplated the restriction: to release the juristic person from it would therefore be to alter the contract, and to create a new juristic person<sup>3</sup>. From another point of view, the juristic person would be incapable of exercising the extended capacity, because its officers, servants and agents whose authority is limited by the contract of constitution would have no authority to exercise it<sup>4</sup>. To permit a juristic person so to change its character and assume capacities not contemplated in its constituting documents would lead moreover to great confusion. Suppose that a commercial association should acquire in a foreign state property which according to its personal law it was incapable of acquiring, how could it deal with the property in its balance sheets? and

(b) Distinction between essential and transient limitations.

<sup>1</sup> Hoyt v. Thompson's Executor (1859), 19 N.Y., 207.

<sup>2</sup> Cp. Despagnet, No. 61, p. 72; Von Bar, p. 237, who holds, however, that all restrictions affect status; and Savigny, § 365, who holds that none do.

<sup>3</sup> Cp. Pillet, p. 206.

<sup>4</sup> Cp. Risdon Iron Works v. Furness, considered post, p. 185.

what would be the rights of its creditors against an asset of which it both was and was not the owner<sup>1</sup>? There are of course no such difficulties in permitting a juristic person to exercise abroad capacities which it is prevented from exercising in its state of origin by restrictions relating to the interests of third parties only, and not affecting its character and constitution. The parties to its constituting contract must be deemed to have contemplated that the juristic person would operate in countries where the restriction would not apply, and that it would exercise there the larger capacities allowed to it according to the territorial law.

**The manner in which a Foreign Juristic Person must exercise its capacities.**

10. The kinds of capacity which a foreign juristic person may exercise having been determined, it remains to determine in what manner those capacities must be exercised and how far the manner of their exercise must be controlled by the personal law, and how far by the territorial law.

Manner of  
exercising  
capacities.

*The Sphere of the Personal Law.*

In the first place it is generally agreed that, as in the case of a natural person, it is the personal law that must rule those circumstances which constitute the character of a juristic person, amongst which the principal are its constitution and internal organisation. It is the personal law therefore that governs the following matters.

(a) Sphere of  
the personal  
law.

(a) It is a matter for the personal law whether or not the particular group is entitled to a personality distinct from that of its members<sup>2</sup>: This includes all questions as to the sufficiency and legality of the preliminary formalities performed, such as registration, and the consequences of any omission therein. *Locus regit actum*; and such formalities must be governed by

<sup>1</sup> Cp. Laurent, vol. IV., p. 274.

<sup>2</sup> Cp. Lyon-Caen and Renault, p. 800; Asser and Rivier, p. 146; Surville and Arthuys, p. 554; Fiore, § 304. Thus it has been held that an English partnership cannot sue in France, although in France the *Société en nom collectif* has private personality and could sue. *Trib. de Douai*, Judgment of 1st December, 1880, Clunet, 1882, p. 317.

the *lex loci actus*<sup>1</sup>. It has been argued on the other hand that a foreign commercial association ought not to be allowed more favourable treatment in such matters than a domestic commercial association; and that if the formalities required by the personal law are less onerous than those required by the territorial law, a foreign commercial association must perform the latter also, even in the absence of any express provision to that effect, in order to prevent an undue preference in its favour, and unfair competition with domestic commercial associations. But the evil of unfair competition is a political matter, and needs a political remedy. It is open to the state if such competition is contrary to its policy, to impose conditions upon foreign juristic persons in order to equalise matters. But until it has done so, there is nothing in the circumstance to affect the purely juridical position of foreign juristic persons, and the courts should not anticipate the legislature. Nor is the remedy proposed in any case appropriate to the abuse. If a state is for some reason dissatisfied with the formalities required for the constitution of the juristic persons of some other state that seek to operate in its territories, it can refuse to recognise their personal status; but to recognise that status, and at the same time to impose upon them the rules of the territorial law as to the constitution of similar juristic persons, is self-contradictory, since the imposition of the rules of the territorial law amounts to a refusal to that extent to recognise the personal law to which they are entitled in virtue of their status. It is legitimate to reject a foreign juristic person altogether, but both to recognise it and also to seek to tinker its constitution is to produce confusion and to disregard the principle that those rules only of the territorial law should be imposed on foreign juristic persons which concern the interests of the public, and not those which affect its constitution and the relations of its members *inter se*. It follows that it is quite irrelevant to any question relating to the status and capacities of a foreign juristic person, whether juristic persons of a similar type exist according to the territorial law. There is no general type of juristic person. The similarity

<sup>1</sup> Cp. Mamelok, p. 275; *Montgomery v. Forbes* (1889), 148 Mass., p. 249; *Lyon-Caen and Renault*, p. 800; *Von Bar*, p. 238; *Mohl, Staatsrecht, Völkerrecht und Politik*, vol. 1., p. 621; *Diena*, p. 278; *Vincent and Pénaud, tit. Société* (1); *Asser and Rivier*, p. 198; also *Trib. de Gand*, *Pasicrasie Belge*, 1884, 2, 64.

between the social and commercial conditions of civilised states has produced a certain similarity in the constitutions of their respective juristic persons, but an English common law corporation is still very different from a German *corporation*, a German *Aktiengesellschaft* from a French *Société Anonyme*, and a French *Société en Nom Collectif* from a Scotch Partnership. To make the existence of domestic juristic persons of the same type a condition precedent to the recognition of a foreign juristic person, or to enforce upon the latter compliance with the territorial law as to the forms of constitution, would be practically to refuse to recognise foreign juristic persons at all.

(b) The personal law governs the organisation of the juristic person, its internal constitution and administration, and the manner in which it must express its will and perform its functions<sup>1</sup>. This includes questions as to the minimum number of members necessary; as to the governing body, officers, directors, servants, and agents it must have; how they must be appointed; the nature and extent of their authorities and responsibilities in relation to the whole body, and the extent of their liabilities in relation to third parties<sup>2</sup>. It includes also all questions, both of substance and form, as to the conduct of meetings, votes and resolutions. In the case of a joint stock company it includes all regulations as to amount, subscription, and paying up of capital, its division into shares, and their nature, number, amount, issue, and transfer<sup>3</sup>.

The personal law governs also the legal relations of the members of the body to each other and to the body itself, in so

<sup>1</sup> Cp. Westlake, § 302; Dicey, rule 128; Vor. Bar, No. 107; Calvo, vol. 11., p. 400; Brocher, vol. 11., No. 271; Rolin, vol. III., No. 1303; Mamelok, *op. cit.*, p. 275, Cl. 8, 159; Asser and Rivier, p. 197; Surville and Arthuys, p. 554; Fiore, § 322; Diena, § 39, p. 278; Lyon-Caen and Renault, p. 800; Resolutions of International Congress of Joint Stock Companies, Paris, 1889, Art. 22, "Les questions relatives à la constitution d'une Société, à son fonctionnement, et à la responsabilité de ses organes doivent être résolues d'après la loi nationale de cette Société."

<sup>2</sup> Cp. Diena, p. 314; Murfree, § 425; Lyon-Caen and Renault, vol. 11., p. 802; Resolutions of the Institute of International Law, 1891, concerning conflicts of law relating to joint stock companies, Art. 2: "Le fonctionnement des sociétés par action, les pouvoirs, les obligations, et la responsabilité de leurs représentants sont régis, même dans les autres états, par les lois du pays d'origine de ces sociétés"; *contra*, Belgian law of 1873, May 18th; and Italian Code Commercial.

<sup>3</sup> Cp. Diena, p. 323; Rolin, vol. 111., No. 1314; *German H.G.B.*, 1., §§ 222—225; *Black v. Zacharie* (1845), 3 How., p. 483; *Scott v. Pequonnock Nat. Bank* (1883), 15 Fed. Rep., p. 494; *Bishop v. Globe Co.* (1883), 135 Mass., p. 132.



far as those relations are derived wholly from their position as members. These include the manner of becoming and ceasing to be a member, the nature, extent, and duration of the liability of the individual members, and the distribution of dividends<sup>1</sup>.

Since the personal law regulates the authorities, responsibilities, and capacities of the officers, directors, servants, or agents of the juristic person, it follows that it is for the personal law to decide also when the juristic person is liable for their acts. The members have contracted with one another on the basis of the personal law of the juristic person, and to apply any other law would be to alter their contract. Courts should also refuse jurisdiction over disputes between members of foreign juristic persons which concern such legal relations alone<sup>2</sup>, partly from motives of propriety, partly from motives of convenience, because the courts of the state of origin of the juristic person are the best authorities as to the law of that state, and to accept jurisdiction might result in conflicting decisions. It makes no difference that the member of the foreign juristic person in question is a subject of the state or domiciled therein. By becoming a member of the foreign juristic person, by purchase of shares or otherwise, he has waived the rights derived from his nationality or domicile in all matters concerning his legal relations towards the juristic person and his fellow members. He has separated to that extent the connection between himself and

<sup>1</sup> Cp. *Trib. Comm. Seine*, Judgment of 25th June, 1875, *Clunet*, vol. III., p. 363; *Cour Cass.* Judgment of 18th January, 1876, *Clunet*, vol. IV., p. 237. Cp. *Diena*, p. 318: "The Regulation of any artificial person in matters concerning only itself or the relations of its members, if any, to it and to one another, must depend on the law from which it derives its existence." Cp. also *Westlake*, p. 358; *Murfree*, p. 272.

<sup>2</sup> Cp. *Westlake*, § 302; *Diena*, pp. 356, 365; *Trib. Comm. Seine*, Judgment of 28th April, 1884; *Clunet*, vol. XI., p. 520; *Trib. Comm. Seine*, Judgment of 28th July, 1884; *Clunet*, vol. XI., p. 403; *North State Copper and Gold Mining Co. v. Field* (1885), 64 Md., p. 151, "Where the act complained of affects the complainant solely in his capacity as a member of the corporation—and is the act of the corporation—then such action is the management of the internal affairs of the Corporation, and in case of a Foreign Corporation our courts will not take jurisdiction"; per *Stone, J.*, at p. 154; also *Maddin v. Electric Light Co.* (1897), 181 Pa., p. 617; and *Timothy Richards v. Clinton Wall Trunk Manufacturing Co.* (1902), 181 Mass. at p. 582, "The rule is well established in this Commonwealth that ordinarily our Courts will decline Jurisdiction in matters which pertain to the interior life and conduct of a Corporation as a creature of a Foreign State and which particularly involve a knowledge and application of the statutes of the state."

his *judex domicili* and has consented to be bound by the personal law of the juristic person, and to be subject to the jurisdiction of the courts of its state of origin<sup>1</sup>. It should be observed that in some cases membership of a body having juristic personality follows a particular document or chose in action. Thus the owner of a share warrant to bearer in an English limited company by reason of his ownership alone is a member of the company, and membership in the company passes from person to person with the property in the warrant. Whether membership in the company does so pass in general in consequence of the transference of the property in the document is a question to be decided by the personal law of the juristic person: but on the other hand the question whether the property in the document has passed in a particular case is a question to be decided by the *lex loci contractus*. Membership in the company may therefore depend indirectly on the latter and so, if the share warrant is sold necessarily in several different states, it may depend successively on several different laws<sup>2</sup>.

(c) It follows consequently from (a) and (b) that the personal law must govern the liquidation or winding-up of juristic persons<sup>3</sup> whether by insolvency, forfeiture, expiration of time, or for any other reason. It decides under what circumstances the juristic person must be considered to have ceased to exist, or when it is necessary to bring it to an end. To it must be referred also the adjustment of the rights and liabilities of members which is necessary in the liquidation or winding-up<sup>4</sup>. The place at which the liquidation of an insolvent juristic person should be conducted and the effect of the proceedings in the liquidation must be determined by reference to considerations which do not differ in the case of a juristic person from that of a natural person, and the same differences of opinion which exist as to the one exist as to the other also. In discussing the place at which liquidation should take place it may be contended on the one

<sup>1</sup> Cp. *Hutchins v. New England Coal Mining Co.*, 4 Allen, p. 580; and *Hodgson v. Cheever*, 8 Mo. App., p. 318.

<sup>2</sup> Cp. *Mamelok*, p. 276; *Diena*, p. 323.

<sup>3</sup> Cp. *Lyon-Caen and Renault*, vol. II., p. 802; *Von Bar*, *op. cit.*, p. 238; *Brocher*, p. 101; *Asser and Rivier*, p. 240; *Surville and Arthuys*, p. 554; *Rolin*, vol. III., No. 1331.

<sup>4</sup> *Canada Southern Railway Co. v. Gebhard* (1883), 109 U.S. Rep., p. 527; *Relfe v. Rundle* (1880), 103 U.S. Rep., p. 222.

hand that convenience and the indivisible nature of rights of property demand that liquidation also should be one and indivisible, and should be conducted in the juristic person's state of origin only: or it may be contended on the other hand that credit is given on the security of visible goods, and therefore liquidation should not be single, but should be conducted simultaneously and independently in every state in which the juristic person possesses property<sup>1</sup>.

Similarly in deciding the question of the effect of proceedings in a liquidation, such as the assignment of the juristic person's goods to a trustee or liquidator, it may be contended either that, in order to insure equality amongst creditors, such proceedings must have universal effect, and must affect the property of the juristic person in every state: or on the other hand that they affect that part of its property only which is situated in the state in which they take place<sup>2</sup>. Such controversies, however, belong less to the present subject than to the subject of insolvent liquidation in general as a branch of private international law. It is necessary here only to point out the differences between the circumstances of a juristic person and of a natural person which must be taken into account in applying to the former any conclusions arrived at in connection with the latter.

The liquidation of a juristic person differs from that of a natural person in the important circumstance that while the latter survives the process, to the former it is usually fatal, and its liquidation is accompanied by its dissolution, or at least by changes in its constitution, temporary and for the purposes of the liquidation only, or permanent and in the nature of a reconstruction. Now it is for the rules of law of the state in which a juristic person is domestic, the personal law which regulates its existence, to regulate the cessation of its existence also, or any changes in its constitution<sup>3</sup>: and the courts of the state in which it is domestic, and which are best acquainted with those rules of law, are the most competent, or if we accept the theory that a juristic person is the creation of the state, the only courts

<sup>1</sup> Cp. Pic, p. 590; Westlake, p. 159; *Sigu Iron Co. v. Brown* (1901), 58 N.Y. App. D, p. 436.

<sup>2</sup> Cp. Dicey, rr. 68, 69; Williams on Bankruptcy, 9th ed., p. 196; *The Bankruptcy Act*, 1883, §§ 44, 54; Westlake, p. 153; Story, §§ 403—417.

<sup>3</sup> Cp. Von Bar, p. 1019, § 479.

competent at all, to deal with the matter<sup>1</sup>. A state, as it is said in the United States, has no visitatorial power over a foreign corporation<sup>2</sup>. A decree of dissolution, or a change in its constitution, effected in its state of origin, must be recognised to affect it everywhere as part of its personal law, but an attempt to dissolve it or to change its constitution in another state could only be treated in its state of origin and elsewhere as a withdrawal by that state of the recognition which it had accorded to the personal status of the juristic person or an alteration of the terms on which that recognition was given; and it would leave its status elsewhere unaffected. Liquidation of a juristic person possesses, therefore, an intrinsic unity for reasons which do not apply with the same force to natural persons. The final steps in the process can be accomplished only in its state of origin. For this reason courts of other states should recognise the courts of that state as the courts of primary jurisdiction presiding over the liquidation. As a matter of convenience, where the juristic person has assets in the foreign state, the local courts may undertake or supervise a local liquidation<sup>3</sup> in order to promote a uniform and equitable distribution of assets, and in that case the local proceedings are governed by the territorial law as the *lex fori*: but such local proceedings should be recognised to be ancillary to the proceedings in the state of origin, and the local courts should act as auxiliaries to the courts in the latter state<sup>4</sup>, even though, as must be the case in countries such as the United States which reject the doctrine of the unity of bankruptcy, they do not recognise any paramount jurisdiction inhering in them<sup>5</sup>. The local proceedings cannot have any effect upon the existence of the juristic person; they operate only as a withdrawal of the recognition of its personal status which it previously enjoyed within the state. It will be seen hereafter<sup>6</sup> that the practice of the English Courts is in accordance with the above doctrine.

<sup>1</sup> Marion Phosphate Co. v. Perry (1896), 74 Fed. Rep., p. 425.

<sup>2</sup> Republican Mountain Silver Mines Ltd. v. Brown (1893), 58 Fed. Rep., p. 644; North State Copper Gold Mining Co. v. Field (1885), 64 Md., 151.

<sup>3</sup> Redmond v. Hoge (1874), 3 Hun., p. 171; Blake v. McClung (1898), 192 U.S. Rep. at p. 247.

<sup>4</sup> Holbrook v. Ford (1894), 153 Ill., p. 633; s.c. 46 Am. St. Rep., p. 917.

<sup>5</sup> Shinney v. North American Savings, Loan and Banking Co. (1899), 97 Fed. Rep., p. 9; Lewis v. American Naval Stores Co. (1902), 119 Fed. Rep., p. 391.

<sup>6</sup> Post, p. 279.

*The Sphere of the Territorial Law.*

Foreign juristic persons are subject, as has been seen, to those rules of the territorial law affecting the kinds of capacities which can be exercised by foreigners in general ; and similarly they are subject to those rules of the territorial law which affect the manner in which foreigners in general must exercise their capacities. The following are the principal matters in which foreign juristic persons thus become subject to the territorial law.

(b) Sphere of the territorial law.

(a) The rules of territorial law govern them in all matters of practice and procedure<sup>1</sup>. In particular they must, in the continental phrase, deposit when required the *cautio judicatum solvi*<sup>2</sup>, known to us as security for costs.

(b) They are subject to the rules of the general criminal or penal law of the country, in so far as it affects juristic persons. This principle is subject however to a certain limitation. If the foreign juristic person is to be recognised as possessing personal status and a personal law, it is impossible that it should be subjected to that portion of the territorial criminal and penal law which has been enacted in relation to the constitution of domestic juristic persons<sup>3</sup>, to oblige them to observe a particular form of constitution. If foreign juristic persons were to be subjected to its provisions, they would be obliged to adopt the same constitution as domestic juristic persons, and would thus in effect be deprived of recognition as persons, and have imposed upon them the character of domestic juristic persons of the same type. A German *Aktiengesellschaft* for instance should not be held liable for penalties under § 70 of the Companies (Consolidation) Act of 1908 for default in publishing special resolutions, because that would be compelling it to conduct its operations as if it were an English Limited Company, which it would be unable to do.

It is necessary in this connection to distinguish the acts of the juristic person itself from the acts of its officers, servants, or agents. Whether or not the juristic person is responsible for the acts of the latter is a question for the personal law. The

<sup>1</sup> Cp. Lindley, *Company Law*, p. 122.

<sup>2</sup> Cp. Mamelok, p. 76 ; Diena, p. 356.

<sup>3</sup> Cp. Murfree, § 425 ; Lyon-Caen and Renault, p. 801 ; Surville and Arthuys, p. 554 ; *Cour Cass.* Judgment of 16th June, 1885 ; Sirey (1885), 1, 251 ; and *Trib. Comm. Seine*, Judgment of 21st July, 1892, Clunet, 1892, p. 1189.

*lex loci delictus* decides whether an offence has been committed, but whether or not the juristic person is responsible as principal for an agent's offence depends on the terms and incidents of the contract between the two, and especially on the capacity of the juristic person to incur the responsibility in question. The contract is governed by the *lex loci actus* or by whatever other law may be applicable thereto. If the agent in question is an officer of the juristic person, such as the director or manager of a joint stock company, the contract governing his position is the constituting contract which is the basis of the existence of the juristic person, and the law determining the responsibility of the latter is its personal law. But if there is a special contract between the offending agent and the juristic person, the responsibility of the latter depends, as to the interpretation of the contract, on the *lex loci contractus* or whatever other law may be applicable to the contract, and as to the capacity of the juristic person to incur the responsibility, on its personal law.

(c) Foreign juristic persons are subject to the rules of the territorial law in all matters of revenue and in particular as to their liability to taxation<sup>1</sup>. It is self-evident that those who avail themselves of the advantages of peace, security, and opportunities for trade provided by a state must contribute towards the funds by which the organisation of the state is supported; and a juristic person does not differ in this respect from any other person. The manner and extent to which any juristic person and a foreign juristic person in particular should contribute are political rather than juridical questions, and need not be discussed here. The great variety which is exhibited by the fiscal schemes and bases of taxation of civilised countries, especially in relation to income taxes, prevent any general conclusions. It may be noticed however that the liability of a foreign juristic person to taxation is frequently made to depend on its possession of a branch office or agency, and this policy appears to be not unreasonable. The possession of a branch office or agency may reasonably be treated as a test whether the foreign juristic person avails itself of the advantages offered by the state to such an extent as to make it fair that it should contribute towards its expenses. Conversely, when a foreign juristic person

<sup>1</sup> Cp. Von Bar, p. 255, § 115; Mamelok, p. 286; Thompson, § 8087.

has no branch office or agency, and thus gains no advantage from the organisation maintained therein, it ought not to be taxed by that state.

(d) It is frequently maintained that foreign juristic persons, especially commercial associations, which seek to establish a branch office or agency in a state, must be subjected to the territorial law of that state in a more stringent manner than other foreign juristic persons.

This is perhaps a question rather of policy than of jurisprudence. The difference between the juridical position of a foreign juristic person which has a branch office or agency, and that of one which has not, is, as has been seen, that the former is now commonly regarded as being present and having a residence within the state. In special cases, such as that of the common law rule as to service of process, the fact of presence or residence may affect the juridical position of a foreigner: and by acquiring a residence a foreign juristic person, like any other person, no doubt subjects itself to all the rules of the territorial law, such as its revenue laws, which apply to residents in particular as distinguished from non-residents<sup>1</sup>. The possession moreover of a branch office or agency provides a convenient practical test whether a foreign juristic person is in fact discharging its functions within the state, and has become liable to provisions specially attaching to foreign juristic persons in that case. But otherwise there is no true juridical distinction between the position of foreign juristic persons with and without branch offices or agencies from which it can be argued that the former are necessarily subjected to a greater extent to the territorial law, or from which it can be determined to what additional provisions of the territorial law they are subjected. It is no doubt reasonable that a resident should be compelled to conform more closely than a non-resident to the laws of the state with which he has formed so intimate a connection. But the motives of the differentiation being political, its nature and extent must be sought in an act of the legislature, and in the absence of any

<sup>1</sup> "A Corporation which seeks by its agents to establish a domicile of business in a State other than that of its creation must take the domicile as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there." *A. G. v. Bay State Mining Company* (1868), 99 Mass. at p. 153.

such act, juridical theory provides no reason why or how the differentiation should be made.

It is sometimes said that, even in the absence of any express provision of the territorial law to that effect, foreign juristic persons which seek to establish agencies or branch offices abroad must be subjected to the rules of the territorial law affecting domestic juristic persons of the same type in so far as they impose the necessity for an official authorisation<sup>1</sup> and enforce the publication of accounts, balance sheets, or other details of their private affairs<sup>2</sup>; especially in case of the association being liquidated<sup>3</sup>, and in respect of the capacities and liabilities of their representatives at the branch office or agency<sup>4</sup>. The mere fact of residence or possessing a branch office or agency provides no basis for such conclusions. They may, however, with more reason be based upon a totally different consideration. Rules as to publicity are, of all others, enacted by the state in the interests of the general public: and it may therefore be said that on general grounds they are a part of the territorial law with which all foreign juristic persons must comply, whether they have a branch office or agency, and are residents, or not. Were a state expressly to enact any such rules of publicity in relation to foreign juristic persons operating within its territories<sup>5</sup>, undoubtedly such

<sup>1</sup> Resolutions of the Institute of International Law relating to the capacity of foreign public juristic persons in 1897: "(7) Les personnes morales publiques d'un pays ne peuvent pas créer, en dehors de ce pays, des établissements rentrant dans la sphère de leur activité, sans s'être munies des autorisations exigées par la loi territoriale pour la création d'établissements similaires." I take this to be the meaning also of the following Resolution of the International Congress of Joint Stock Companies at Paris in 1889: "(26) Là où des Sociétés sont, à raison de la nature de leurs opérations, soumises à un régime spécial, il serait naturel de soumettre à ce régime les agences ou succursales des Sociétés étrangères, sous la même sanction que celles qui sont applicables aux Sociétés du pays."

<sup>2</sup> Cp. Resolutions of the Institute of International Law as to Conflict of Laws relating to Joint Stock Companies, in 1891, art. 3, quoted above, p. 85, note 2. This Resolution was adopted by the International Congress of Joint Stock Companies at Paris in 1900 as part of their 22nd resolution.

<sup>3</sup> Cp. Pillet, *Essai d'un Système &c.*, Clunet, 1895, p. 255, note 1.

<sup>4</sup> Cp. Diena, p. 331, § 48. Cp. also Resolution of the International Congress of Joint Stock Companies at Paris in 1889: "(art. 24) Des formalités de publicité doivent être remplies par les Sociétés étrangères qui veulent établir des agences ou succursales dans un pays. Les personnes préposées à la gestion de ces agences ou succursales doivent être soumises à la même responsabilité envers les tiers que si elles géraient une Société du pays."

<sup>5</sup> e.g. § 274 of the Companies (Consolidation) Act, 1908.



an enactment would be of universal validity, since it would affect the interests of members of the public, the subjects of that state, only. But when such rules as to publicity are enacted in relation to domestic juristic persons only it cannot be implied that they were intended by the legislature to apply to foreign juristic persons: and there is no difference in this respect between foreign juristic persons which have a branch office or agency and those which have none. It may therefore be said that there is no reason why a foreign juristic person possessing a branch office or agency should be subjected to the territorial law to any greater extent than other foreign juristic persons except in so far as an intention to that effect appears in the territorial law itself<sup>1</sup>.

(e) Finally, the rules of the territorial law must govern the issue or sale, including the negotiability<sup>2</sup>, of shares, share warrants, debentures or other deeds of title, in a foreign commercial association. They are the *lex loci actus*, and clearly concern the interests of the general public<sup>3</sup>.

<sup>1</sup> Cp. Fiore, § 322.

<sup>2</sup> Cp. *Colonial Bank v. Cady and Williams* (1890), 15 A.C., p. 267.

<sup>3</sup> Cp. Resolutions of the Institute of International Law as to Conflict of Laws concerning Joint Stock Companies in 1891: "(art. 4) Les conditions légales soit des émissions, soit des négociations d'actions, ou obligations des sociétés étrangères sont celles qu'exigent la loi du pays dans lequel ces émissions ou négociations ont lieu." Also Resolution of Congress of Joint Stock Companies at Paris in 1889: "(art. 22) Les règles sur l'émission d'actions ou d'obligations doivent s'appliquer dans un pays, quelle que soit la nature de la Société qui fait appel au public. Le même principe doit être admis en ce qui concerne la négociation publique."

## CHAPTER IV

### NATIONALITY AND DOMICILE

1. PRELIMINARY in logical sequence to all other questions concerning foreign juristic persons is the question what juristic persons are foreign. But for the sake of convenience in the arrangement of this work, the question which comes first in natural order has been kept for discussion last. In previous chapters it has been assumed that in the sight of every state there exist two classes of juristic persons, the domestic and the foreign. The domestic or foreign character of any particular juristic person referred to has been assumed ; and the state in which the juristic person was domestic has been referred to, for convenience' sake, as its state of origin, without thereby implying any particular relation between the juristic person and that state. It is now necessary to get rid of that convention, and to determine what is the nature of the relationship between the juristic person and the state, what are the circumstances in its existence, and elements in its nature, which must be considered in deciding whether it is domestic or foreign.

2. The use of the words domestic and foreign seems to imply that a juristic person can possess nationality, and the inquiry with which this chapter is concerned is commonly described by continental jurists as an inquiry into the nationality of juristic persons. The use, however, of the word nationality introduces some danger of confusion. In its ordinary meaning, its content is not purely juridical ; it is partly political also. To say of any one that he is an Englishman by nationality implies, from the juridical point of view, that his legal capacities must be regulated in all states by the rules of

Meaning of  
nationality of  
a juristic  
person.

English law, in other words, that English law is his personal law. But it also implies that he possesses a number of vaguely defined political qualities, such as his title to claim the support of the diplomatic influence of Great Britain, in case of his being subjected to injustice abroad. Whether a juristic person is capable of possessing nationality in this political sense may be open to doubt<sup>1</sup>, although those who maintain that its personality is real will probably affirm that it is so capable. But the controversy belongs rather to political than juridical science, and we are not here concerned with it. When use is made here of the word nationality, it should be understood that it is used to imply juridical ideas only, so that when it is said that a juristic person has English nationality, for instance, all that is meant is that the rules of English law are its personal law.

3. It is especially necessary to point out the restricted sense in which the word nationality must be employed in discussing juridical questions concerning juristic persons, because it is precisely the sense in which the word is not employed in English law. British nationality is the nationality of a state which contains within itself many systems of law, the Common Law, Roman Law in Scotland, Roman-Dutch law at the Cape, and the numerous Asiatic systems. This circumstance has prevented us from accepting nationality as the test of personal law, and has led us to rely upon another standard, that of domicile, which enables us to discriminate between persons of the same nationality. According to English law, therefore, the context of the idea of nationality is political rather than juridical. To say that a man has British nationality implies that he possesses those vague qualities and privileges to which reference has been made, but it does not necessarily imply that the rules of English law are his personal law. In dealing with the law of England therefore it is doubly necessary to make it clear in making use of the word nationality, or the words domestic and foreign as implying possession of nationality, that the question of the nationality of a juristic person is only the question of its personal law, so that to say that it has a certain nationality means only that the rules of law of a certain state are its

<sup>1</sup> Laurent, *Principes de Droit Civil*, vol. 1., p. 404; Von Bar, § 104, p. 227, note 1; Lyon-Caen and Renault, vol. II., § 1167; Vareilles Sommières, *Les Personnes Morales*, p. 645; Arminjon, p. 381.

personal law; and that the words "domestic" and "foreign" have a similar significance. By saying that a juristic person is domestic in a certain state we mean only that its personal law is composed of the rules of law of that state. That is the only purely juridical idea contained in the word; whatever further ideas it may contain concern other sciences than jurisprudence.

4. The nationality of a natural person, and therefore also according to legal systems which accept nationality as the test of personal law, his personal law, depends either upon the circumstances of his birth, or upon some process of naturalisation. Juristic persons are not born, and no state has yet instituted any process by which they can be naturalised. An analogy between them and natural persons in this connection must therefore be fanciful. The tests which determine the personal law of a natural person, can, according to those legal systems, be of no assistance in determining the personal law of a juristic person. According to our own law, the personal law of a natural person depends not upon his nationality but upon his domicile. As will be seen, no great difficulty has ever been felt in allowing that a juristic person is capable of having a domicile; and an analogy between the two cases might here be properly applied. The personal law of a juristic person, it might be said, according to English law depends like that of a natural person on domicile. This analogy, however, could have no validity in the legal systems first referred to, in which domicile is not accepted as a test of the personal law of a natural person. In the absence of any analogy of general validity, the greatest divergence of opinion has existed as to the true test to which the matter must be referred, a divergence which appears to have been changing of late into a concurrence of opinion in favour of a particular theory to which reference will be made. The discussion has been carried on for the most part by continental jurists, to whom nationality is the test of personal law. It will therefore be convenient in following them to make use of that word, remembering that it must be used in that sense only which has already been defined, as meaning the quality of possessing a particular personal law. The principal theories which have been proposed and maintained by competent authorities and the reasons for and against them are as follows.

Analogy  
between natu-  
ral and juristic  
persons.

*A juristic person is domestic in the state in which the majority of its members (or the owners of the greater part of its capital) are domestic.*

5. This opinion is probably that which will occur first to practical minds, and it has received some support from jurists also. "A company or association," says M. de Vareilles Sommières, "being really nothing but a group of individuals bound together by reciprocal agreements and common interests, has no other nationality than that of its members<sup>1</sup>." This argument is the natural outcome of an opinion held by M. de Vareilles Sommières and others, especially in America, as to the nature of juristic personality in general. It is, they maintain, nothing but a "thin veil" thrown over natural persons, the members of the juristic person, to unify and condense<sup>2</sup>; and "the fact remains self-evident that a corporation is not in reality a person or a thing distinct from its constituent parts. The word corporation is but a collective name for the incorporators"; so that "the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being<sup>3</sup>."

The validity of a general theory of this nature need not be discussed here<sup>4</sup>; it is sufficient to say that its application in the present case is beset with practical difficulties; and that its inability to provide a satisfactory practical solution to the problem of the nationality of a juristic person must cast doubt upon its theoretical validity. The members of a juristic person, especially of a joint stock company, may belong to many different nations, or be domiciled in many different countries. They are also a changing body, and one member may be, and often is, succeeded by another of a different nationality. If then

<sup>1</sup> *Synthèse de Droit International Privé*, vol. II., p. 74; also *Les Personnes Morales*, p. 645.

<sup>2</sup> Vareilles Sommières, *Synthèse de D. I. P.*, vol. II., p. 78.

<sup>3</sup> Morawetz, p. 2; see also § 735 et seq.; and Taylor, *The Law of Private Corporations*, § 60, and § 145 et seq.

<sup>4</sup> For a general discussion see Maitland's Introduction to Gierke's *Political Theories of the Middle Ages*, p. xxiv.

the nationality of the juristic person is to follow that of the majority of its members, or of the holders of the greater part of its capital, since the nationality of the majority may rapidly fluctuate, that of the company may fluctuate also, and in the case of a joint stock company for instance whose shares are largely dealt with in more countries than one, there must be complete uncertainty at any particular time what its actual nationality for the moment may be. Such a consequence would lead to the utmost confusion, and would even make it impossible for the company to exist. Difficulties of this nature are less great in the case of other species of juristic persons which do not exist in England. Neither our common partnerships nor our limited partnerships have juristic personality. But the continental *sociétés en commandite* and *en nom collectif* have juristic personality, and in these the membership is permanent. The personality of the members, moreover, has a more obvious effect upon the personality of these juristic persons than has the personality of the shareholders upon that of a joint stock company, which is an association of capital rather than of men. The death or bankruptcy of one of them is followed by the death or bankruptcy of the juristic person; and it seems therefore more reasonable that the juristic person should be affected by their characteristics also in the matter of nationality. For these reasons some would confine this theory to juristic persons with permanent membership<sup>1</sup>. But when the members of such juristic persons as these are of different nationality, it must often still be difficult to ascertain which nationality is the greater either in numbers or interest. What, for instance, would be the nationality of a *société en nom collectif* which consisted of two partners, a German and a Frenchman, whose interests in the undertaking were equal?

Those who take an orthodox view of the nature of a juristic person and regard it as an entity essentially different from its

<sup>1</sup> "Bien que ne se confondant pas avec le corps moral dont ils font partie, les associés sont plus en évidence dans les sociétés en nom collectif ou en commandite ordinaire. Faire complètement abstraction de leur nationalité, paraît difficile; ne peut-elle pas, si elle est le même pour tous, se communiquer à la société dont ils sont le plus puissant élément de la vie?" Brocher, vol. I., p. 194; and cp. Pineau, p. 157. In the French courts there has been a series of conflicting decisions (cp. Clunet, vol. XII., p. 192), some holding that the nationality of such juristic persons follows that of its members, and some the contrary.

members, whether it be an imaginary fiction of law or a real phenomenon of nature, must reject the theory under discussion on general grounds. If the personality of a juristic person is a different thing from that of its members or any section of them, there can be no reason why it should share their characteristics in the matter of nationality or in any other matter. "One must not," says Fiore<sup>1</sup>, "confuse the juridical characteristics of individuals *uti singuli* with the juridical characteristics of the juristic person *uti universitas*." Accordingly we find that the theory is commonly referred to only in order that it may be dismissed as obviously unsound, to whatever sort of juristic person it may be applied<sup>2</sup>.

The case of a juristic person which owns ships has some special features which can be best dealt with in this connection. Legislation exists in many states to the effect that ships shall not bear the national character of the legislating state unless they are owned wholly or in part by persons domestic in its territories. What then is the national character of a ship which is owned by a company which has its centre of administrative business within the territories of a state in which such legislation exists, but the whole or a part of whose members are foreigners? It has been contended that under these circumstances it is necessary to look behind the personality of the company to that of its members, and considering these as the true owners of the ship, to hold that the ship cannot have the national character of the country in which the centre of the administrative business of the company is situated<sup>3</sup>. But to refer the nationality of a juristic person to that of its members

<sup>1</sup> Fiore, p. 303, § 305.

<sup>2</sup> Arminjon, p. 390; Haladjian, p. 67; Weiss, p. 416; Lyon-Caen and Renault, vol. II., § 1165; Calvo, p. 227, § 737; Fiore, p. 638; Diena, p. 259; Pic, p. 577; Lyon-Caen, *Journal des Sociétés*, 1888, p. 35; Pont, *Traité des Sociétés*, No. 1866; Asser and Rivier, p. 197; Vincent and Pénaud, *tit. Sociétés*, §§ 17, 18; Chervet, p. 126; Surville and Arthuys, § 456; Sacopoulo, pp. 125, 171; Pineau, pp. 124, 159; Mamelok, p. 213. Cp. Old Dominion Co. v. Lewisohn (1907), 210 U.S. Rep., p. 206.

<sup>3</sup> *Avis du Conseil d'Etat*, 5 April, 1887, Clunet, vol. XIV., p. 250. The Institute of International Law at their conference in 1896 adopted this contention and expressed it in the following rules, part of a series as to the national character of merchant ships and their inscription on national registers, "Art. 2: To be inscribed in the register kept for this purpose the ship must be (a) more than half the property of nationals, or (b) of a *société en nom collectif* or *en commandite simple* of which more than half the members personally responsible are nationals, (c) of a company limited

seems as unsatisfactory in the case of a ship-owning company as in that of any other sort of company. The personality of the company is different from that of its members, and it is not the members that are owners of the ship, but the company. It will be seen from what follows that the nationality of the company should depend in this case as much as in any other on the situation of its centre of administrative business. It is domestic in the territories of the state in which that centre is situated, and its ships should therefore be permitted to bear the national character of that state, in which their true owner is domestic<sup>1</sup>.

*A juristic person is domestic in the state  
which authorised it.*

6. There is a general concurrence of opinion amongst continental writers that when the formation of a juristic person is accompanied by an express authorisation or recognition of its personality by the sovereign authority of the state in which it is formed, that circumstance is conclusive in deciding that the juristic person in question possesses the nationality of that state. "It is from the state," says Weiss, "that every juristic person holds its existence and its rights; the express or implied recognition of the public authority is indispensable to its formation.—Everywhere

Nationality  
follows  
that of the  
authorising  
state.

by shares (joint stock or *en commandite*) of which two-thirds at least of the members of the governing body are nationals; the same rule is applicable to associations and to other juristic persons owning ships." "Art. 3: The undertaking (whether it is a case of individual *armateurs*, of companies, or of corporations, must have its seat in the state the flag of which the ship should carry, and where it should be registered." By the state of which a ship *ought* to bear the flag and in which it *ought* to be registered, is meant apparently the state of which the persons referred to in Art. 2 are the nationals. The effect of Art. 3 therefore, is to refer the nationality of the ship-owning company ultimately to the nationality of those persons and to reject the situation of its seat as the ultimate test.

<sup>1</sup> This conclusion is adopted and expressly enacted by the Merchant Shipping Act, 1894, § 1, "a ship shall not be deemed to be a British ship unless owned wholly by persons of the following description: namely, (d) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominion, and having their principal place of business in those dominions." Principal place of business in the case of a ship-owning company must mean principal place of administrative business. So also Pic, § 1; Pineau, p. 166; Belgian law of 20th January, 1873; cp. also Italian Law, 24th May, 1877; and German Law, 25th October, 1867.



we see these different persons borrowing the nationality of the legislature from which they have received their existence<sup>1</sup>"; and again, as to commercial associations, "every association is foreign which is formed with the express or implied consent of a foreign state which, in giving it existence, communicates to it at the same time its nationality<sup>2</sup>."

"In the case of a fictitious being," says Pineau, "the law which gave it existence conferred nationality upon it at the same time. If a commercial association requires, for its existence, the express consent of the public authorities, it bears the stamp of the state which presided at its birth, it is incorporated with it, and has no other nationality<sup>3</sup>."

In the United States, as has been seen, the theory that the personality of a corporation is a fictitious creation of the state and exists only in contemplation of the law has been expressly accepted and rigidly applied. Proceeding from this as the fundamental principle to be applied in ascertaining the legal position of a foreign corporation, the courts of the United States were not likely to question, and in fact appear never to have questioned, that a foreign corporation must be domestic in the state which was considered to have created it, and that the laws of that state must be its personal law. There are direct decisions in support of this doctrine. The Federal courts have no jurisdiction in general over a suit between citizens of the same state but only over a suit "between a citizen of the state where it is brought and a citizen of another state<sup>4</sup>." In order, therefore, to ascertain whether they have jurisdiction over a suit to which a corporation is party, it is necessary to determine of what state that corporation is a citizen. Citizenship for the purposes of determining jurisdiction is not the same thing as nationality for the purposes of determining personal law; but they are closely connected, and *prima facie* the state in which a corporation is a citizen for the purposes of jurisdiction is also the state in which

<sup>1</sup> Weiss, p. 392; cp. also Calvo, p. 227, § 737; Fiore, § 418; Mexican Law, 28th May, 1886, "The nationality of moral persons or entities is determined by the law which authorises their formation; in consequence all those constituted in conformity with the laws of the Republic are Mexican, provided that they have here their legal domicile."

<sup>2</sup> Weiss, p. 415; Fiore, p. 638.

<sup>3</sup> Pineau, p. 122; cp. Sacopoulo, p. 125.

<sup>4</sup> Revised Statutes U.S., § 629 (1).

it is domestic in the sense that the laws of that state relating to corporations are its personal law. It was early decided that a corporation generally speaking is not a citizen at all<sup>1</sup>; and in view of this principle it was at first considered that the Federal courts, in considering the question of their own jurisdiction, must disregard the personality of the corporation, which had no citizenship, and consider the citizenship of the members of which the corporation was composed, so that if one single member of the corporation was a citizen of the same state as that of which the other party to the suit was a citizen, the court had no jurisdiction<sup>2</sup>. Latterly, however, a different opinion has prevailed, and it has been decided that "where a corporation is created by the laws of a state, the conclusive legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence," and that it "is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same state—capable of being treated as a citizen of that state as much as a natural person<sup>3</sup>." So, "for the purpose of Federal jurisdiction it is regarded as if it were a citizen of the state where it was created<sup>4</sup>." The invention of a fictitious legal presumption as to the citizenship of the members of a corporation is a technicality necessitated by the early decisions that a corporation is not in general a citizen; the substantial effect of the decision is that a corporation is in fact a citizen of the state by the laws of which it was created<sup>5</sup>. Apart from the expressions and decisions above referred to this principle is tacitly assumed in almost every case relating to the subject. In *Bank of Augusta*

<sup>1</sup> *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania* (1888), 125 U.S. Rep., p. 181.

<sup>2</sup> *Bank of Vicksburg v. Slocomb* (1840), 14 Pet., p. 60; *Bank of United States v. Deveaux* (1809), 5 Cranch, p. 61; *Hope Ins. Co. v. Boardman* (1809), 5 Cranch Am. Rep., p. 57.

<sup>3</sup> *Louisville Railway Co. v. Letson*, 2 How. at p. 558; *Steamship Co. v. Tugman* (1882), 106 U.S. Rep., p. 118; see also *Rece v. N. N. and M. V. Co.* (1889), 32 W. Va., p. 164; *St Louis and San Francisco Railway Co. v. James* (1896), 161 U.S. Rep., p. 545.

<sup>4</sup> *Railroad Co. v. Harris* (1870), 12 Wall., p. 65; cp. also *Ohio and Mississippi Railway Co. v. Wheeler*, 1 Black at p. 297.

<sup>5</sup> In *North Noonday Mining Co. v. Orient Mining Co.* (1889), 1 Fed. Rep., p. 522, it was similarly held that a corporation is a citizen of the state under whose laws it was organised within the meaning of the Act of Congress of May 10, 1872, declaring all mineral deposits in public lands open to exploration and purchase by citizens of the United States.

v. Earle, for instance, Mr Chief Justice Taney, after holding that an artificial person might make contracts in a sovereignty in which it did not reside, added, "the corporation must no doubt show that the *law of its creation* gave it authority to make such contracts through its agents." We have it said that "in the jurisprudence of the United States a corporation is regarded as in effect a citizen of the state which created it<sup>1</sup>." In cases relating to consolidated corporations it is said that the effect of the consolidation is to create two corporations, and that one is domestic in each consolidating state, because it derives its power from or is created by that state<sup>2</sup>.

The doctrine as it is maintained by American jurists differs in one respect from the doctrine as it is maintained by those of the continent. In America it is assumed that it is applicable to all foreign corporations alike, by whatever process they are incorporated. On the continent it is admitted that it cannot be applied to those juristic persons which have not received any express authorisation or recognition, because they cannot in any true sense be said to have been created by the state. Nothing is easier, it is said, than to fix the nationality of a juristic person if a state has authorised its formation; for the state in authorising it imparts to it its own nationality<sup>3</sup>. Difficulties arise only in connection with juristic persons which are formed without any authorisation from the state. This is a large and increasing class, including as it does nearly all commercial associations; for in most countries commercial associations have been released from the necessity for any form of official authorisation as a preliminary to their formation, and are now able to establish themselves as juristic persons by a simple process of registration. Some even, such as the *société en commandite*, can be formed, in most countries, without even registration. As to these, it is said, some other test of nationality must be found. The state in which they come into existence has in no sense created them. It has not even authorised them, except in so far as it may be said, somewhat artificially, to have given them all a general authorisation *in futuro*. It has had nothing to say to their formation and it has performed no act from which it

<sup>1</sup> St Louis v. The Ferry Co. (1870), 11 Wall. at p. 429.

<sup>2</sup> Muller v. Dows (1876), 94 U.S. Rep., p. 444.

<sup>3</sup> Cp. Sacopoulo, p. 167; Haladjian, p. 67.

is possible to construe an intention of imparting to them its own nationality<sup>1</sup>.

In its limited application to juristic persons which have received an express authorisation the doctrine appears to be based upon several distinct ideas, which have not perhaps been very clearly distinguished by its advocates. (a) Firstly, it is not unnatural that where, as in the United States, all reasoning as to foreign juristic persons proceeds upon the basis that the personality of a juristic person is purely fictitious and can be created by the state alone, it should be considered that the creature must necessarily possess all the characteristics of its creator which it is capable of possessing, amongst which would be its nationality, in a manner analogous to that in which the child derives its nationality from its parents. The validity of this reasoning clearly depends in the first place on the validity of the fiction theory. If the personality of the juristic person is not created by the state, then there is no reason why it should inherit, as it were, the state's characteristics. (b) Secondly, the doctrine is apparently based upon the idea that the express authorisation of the state implies an intention on its part that its nationality should be imparted to the authorised juristic person; and that an expression of the state's intention is conclusive. But the intention of a single state can never be conclusive when we are searching for a fundamental principle of private international law. Such an intention may either be express or implied. In the first case, however strongly it may be expressed, if it transgresses against the rights of other states, it will be disregarded by their courts. An American court would, doubtless, hesitate to give effect to an act of the English Parliament which declared the municipality of Chicago an English corporation, and subject to the Municipal Corporations Act. In the second case, if it is an implied intention, we must in addition seek some principle which will enable us to distinguish between those circumstances under which it must be implied and those under which it must not. In either case we are referred to some basis for our argument more fundamental than the matter of intention; and intention disappears from the scene as the final test of nationality. It is not very clear moreover why any such

<sup>1</sup> Cp. Pic, *Clunet*, 1892, p. 578; Lainé, "Consultation pour le Gouvernement Royal Hellénique," *Archives Diplomatiques*, 1893, part 4, p. 148; Weiss, p. 415.

intention should be assumed to be present in the act of authorisation. There are, indeed, many cases in which states authorise juristic persons in which it is impossible that it should be assumed. Thus, according to the laws of certain states<sup>1</sup>, a foreign commercial association must obtain the express authorisation of the local authority before it can carry on business within the local territories. Again, the Suez Canal Company, which is certainly not an Egyptian company, is recognised by ordinance of the Khedive. It could not be contended that such authorisations as these are intended to domesticate, or do in fact domesticate, the foreign associations to which they are extended. It does not affect their nationality, and yet there appears to be no reason why an authorisation which takes place after the formation of a juristic person should have any different effect from one which takes place at its formation. (c) The substantial basis of this doctrine, however, appears to be different from either of the foregoing. It is obvious that the mere fact that a juristic person has been authorised or recognised by a certain state cannot under all circumstances be conclusive that it possesses the nationality of that state in its international relations. The power of a state to authorise juristic persons is not unlimited. Should it propose to recognise the existence of a juristic person, or to authorise it to discharge certain functions outside its own territories but not within them, it would infringe the sovereignty of the foreign states affected, and its authorisation or recognition could have no international validity<sup>2</sup>. This principle is recognised and acted upon in the hostile treatment which is universally meted out to commercial associations authorised in one country for the purpose of carrying on business in another only, a class which, in the United States in particular, is so numerous as to have earned the specific name of "tramp." It has there been held that "no rule of comity will allow one state to spawn corporations and send them forth into other states to be nurtured and do business there, when said first mentioned state will not allow them to do business in its own boundaries<sup>3</sup>." The Supreme Court of Kansas accordingly refused to recognise the existence of a corporation

<sup>1</sup> Russia; Imperial Decree, 1887, November 9th. Turkey; edict 25th November, 1887. Austria; Ordinance 29th November, 1865. Roumania; Ord. Com. 244.

<sup>2</sup> Cp. Diena, p. 258; Von Bar, p. 238.

<sup>3</sup> Land-grant Railway Co. v. Copper County (1870), 6 Kan., 245.

created in Pennsylvania with power to carry on business anywhere "except in the State of Pennsylvania"; "from the only territory in the whole world," it was said, "over which the state of Pennsylvania has any jurisdiction and control, and in which it could authorise a corporation to have an office or to do business, it excludes this corporation; and the attempt on the part of the state of Pennsylvania to authorise this corporation to have an office or to do business anywhere else except in the state of Pennsylvania is *ultra vires*, illegal and void." It is thus recognised that the power of a state to authorise juristic persons is not unlimited, but can only be exercised so as to possess international validity when some relation exists between the juristic person and the state. But if so, then existence of that relation is the true and ultimate test of nationality, and not the formality of authorisation. If the necessary relation is said to be that the juristic person should be domiciled within the state in the sense of having there its permanent home, so that authorisation by a state of a juristic person domiciled outside its territories would be invalid, then domicile is in effect being substituted for authorisation as the ultimate test of nationality.

Generally, however, when authorisation is said to be conclusive of nationality, not domicile, but a certain other relation between the juristic person and the state is assumed to exist to justify the authorisation. Since the institution of the system of registration for commercial associations, the necessity for an express authorisation has been confined in general to juristic persons which discharge some public function. Juristic persons authorised by some state are now for the most part public juristic persons, constituted to promote such purposes as education, religion, or charity. The organisation of such matters as these falls within the acknowledged sphere of a state's activities, and such functions can be fulfilled by juristic persons only by means of a delegation of authority and power from the state. In performing them a juristic person acts as the arm of the state, and as a member of the state, and, it is said, it must therefore necessarily share the state's nationality<sup>1</sup>.

"It is possible," says Brocher, "to distinguish two classes of juristic persons; some are connected directly or indirectly with the state, the family or with some other organisation of

Authorisation  
and public  
functions.

<sup>1</sup> Cp. Von Bar, p. 227, note 1.

which they are a part or to which they are accessory, and which dominates them ; others, on the contrary, occupy a freer and more independent position. It seems that the first ought to be submitted to the legislation which rules the institution on which they depend. It is for this reason that the state, its sub-divisions, and the various foundations which are connected with it remain, in so far as questions raised by this capacity are concerned, under the control of the legislation which rules them in general<sup>1</sup>.” “ As with a natural person,” says Fiore, “ so with a juristic person, either it forms part of the state, and ought to be considered to be domestic, or it does not form part of it, and ought to be considered to be foreign—and because every juristic person with public functions acquires juristic personality only by an act of the supreme authority of the place where it receives its existence, therefore it is to this *act of foundation* of the said juristic person that one must refer in order to decide whether it ought to be considered domestic or foreign—a juristic person (*giuridiche persone*) depends entirely on its act of foundation, and it is necessary to refer it exclusively to the sovereignty which gave it life in the territories subjected to its supreme power<sup>2</sup>.” Ultimately, then, this theory makes the nationality of the juristic person depend on the nature of its functions, and only indirectly on the nature of the formalities which accompany its formation. It is the functions performed by a juristic person which is public in the above sense that mark it as part of the state’s organism, and the formalities by means of which it obtained leave to exercise those functions are strictly speaking irrelevant circumstances. The doctrine, when it is advocated on these grounds, would be more accurately expressed by saying that a juristic person which discharges public functions is domestic in the state in which those functions are discharged. The formalities accompanying its formation are relevant only inasmuch as they provide a practical test whether the functions of the juristic person in question are public or not. In practice, juristic persons are not permitted by states to be formed without express authorisation to exercise functions for the performance of which it is the business of the state to provide ; and conversely, states do not concern themselves expressly to authorise juristic persons whose purpose it is to exercise functions with which the state does not consider itself

<sup>1</sup> Brocher, p. 97, No. 26.

<sup>2</sup> Fiore, p. 303, § 305.

concerned. Tramp companies which have received an express authorisation are rare. Practically, therefore, express authorisation affords a test whether a juristic person is considered by the state in which it operates as a member of the national organism; and therefore also, according to this theory, it affords a test whether it is impressed with the nationality of that state.

The theory under discussion, and the reasoning by which it is supported, cannot be completely examined until some consideration has been given to the subject of the domicile of a juristic person. But an inherent defect in it may be pointed out here. It makes the nationality of a juristic person depend in the first place on an act performed by the state, and ultimately on the nature of the functions which it performs. In either case, nationality, and the personal law, are made to depend on circumstances other than the internal legal character and conditions of the juristic person; for state authorisation is an arbitrary and external act, and functional capacities are, as has been seen, not necessarily related to civil capacities. The nature of the recognition which a juristic person has received from the state, the part which it plays in the state organism, the extent to which its functions are delegated to it by the state, these are its political rather than its juridical circumstances and have little or no relation to or effect upon its legal characteristics, its constitution, and its civil capacities. Nationality in the present sense, the quality of possessing a particular personal law by which its civil capacities must be governed, is a juridical and not a political quality: the test to which it ought to be referred should, therefore, be sought in its legal circumstances, and to seek it in circumstances other than legal is arbitrary and unscientific.

*A juristic person is domestic in the state in the territories of which the acts by which it came into existence were performed.*

7. The previous theory could have a limited application only. By means of it we could determine the nationality of a particular class of juristic persons, those which receive an express authorisation from the state, a class which, practically speaking, includes all those which are charged with public functions; but it would still be necessary to discover some supplementary principle by means of which we could determine the

Nationality is determined by the place in which the juristic person came into existence.



nationality of juristic persons which receive no such authorisation, including in particular commercial associations.

A principle which recommends itself at first sight, but which has nevertheless been generally rejected on full consideration, is that a juristic person is domestic in the state in which the acts by which it came into existence were performed; and that the law of the state is its personal law. Every foundation would thus be domestic in the state in which it was founded, every corporation in the state in which it was incorporated, and every commercial association in the state in which it was formed and registered. The simplicity of this proposition has recommended it to those who have considered the subject more from the point of view of business than from that of law. Thus the Congress of Joint Stock Companies held at Paris in 1889 resolved as follows: "(Art. 21) Every company has a nationality. The nationality of a joint stock company shall be determined by the law of the place where it was constituted; and where the centre of its administration (*siège social*) has been fixed. The centre of administration of a company can be in that country only in which the company was constituted<sup>1</sup>." In this formula the centre of administration is introduced as a collateral test in one sentence, only to be dismissed again in the next; for if it can only be in the country in which the company was constituted and in no other country, then the place of constitution is the true and ultimate test of nationality, and the formula might be reduced to its first clause without altering its effect, unless some distinction is intended between "place" and "country," which appears not to be the case.

The International Law Association at its conference held at Berlin in 1906 adopted in principle the following resolution, as the second clause of a draft International Code providing for the recognition of foreign companies:—"A foreign company shall be deemed to be domiciled in the country in which it was incorporated, and the liability or non-liability of any member of such company in respect of its acts or contracts shall be determined by the law of its domicile." The meaning of this resolution is by no means clear; it appears to be that the personal law of a

<sup>1</sup> Cp. Guillery's rejected resolution, "the nationality of a joint stock company shall be determined by the law of the place where the constituting act was performed" (*Comptes Rendus*). It will be seen that the similar Congress of Joint Stock Companies that met at Paris in 1900 took a different view.

company, at least in the particular matter of the liability of its members, shall be the law of the state in which it was incorporated; and the word domicile is used as a mere synonym for place of incorporation. In that case the domicile of a company becomes a legal fiction, and not a physical fact. Such a use of the word is unfortunate; it is commonly agreed, as will be seen, that a juristic person can have a domicile which depends upon the natural circumstances of its existence, and the location of which is therefore a question of fact and not of law<sup>1</sup>.

A serious general objection to the theory under discussion is that it makes the nationality of a juristic person depend entirely upon the will of its founders. If nationality is to depend on place of incorporation only, they can give it the nationality of any state they please, regardless of its actual circumstances, by founding it in the territories of that state, and no subsequent event can then deprive it of that nationality, or affect it with another. Intending founders and promoters would be tempted thereby to flock to the state whose regulations for the establishment of juristic persons were the easiest and cheapest, although the juristic persons they desire to found had no substantial connection with that state or its territories. It would become impossible for any state to maintain any regulations for the establishment of juristic persons which were more onerous than those of the state whose regulations were the most lenient; and small states, in order to secure the custom of founders, might be tempted to enter into a competition in leniency. For these reasons it is generally agreed that this theory<sup>2</sup>, or any other that makes the nationality of a juristic person depend upon the will of its founders or members rather than on the legal character and circumstances of the juristic person itself<sup>3</sup>, is unsatisfactory.

<sup>1</sup> The use of the word "incorporation" also has disadvantages in a code relating to foreign companies intended for international use. In France and Germany at least a commercial association, although it may be a juristic person, is not a *corporation* or *Körperschaft*.

<sup>2</sup> Cp. Mamelok, p. 218; *Cour Cass. Rome*, Judgment of 13 September, 1887; Clunet, 1889, p. 511; and 1890, p. 162; Fiore, § 417; Sacopoulo, p. 126; Weiss, p. 415; Lyon-Caen and Renault, § 1166; Diena, p. 260; Pic, p. 577; Thaller, *Annales de droit commercial*, 1890, II., 259; Haladjian, p. 73; Surville and Arthuys, § 456; *Trib. Seine*, 11 Mars 1880; and *Trib. Gand*, 23rd Oct., 1883; Pasicrasie Belge, 1884, II., 64; Belgian Law 18th March, 1873, § 129.

<sup>3</sup> Cp. Lyon-Caen and Renault, § 1164; Sacopoulo, p. 167; Weiss, p. 418; Lyon-Caen, *Journal des Sociétés*, 1880, p. 36.

A further objection to the theory is that it is not impossible that, of the various acts by which a juristic person is brought into existence, some might be performed in one state and some in another. In the case of a commercial association, for instance, the association is not formed by the single act of registration. Its formation involves also a process of organisation, including a contract between the members, and the subscription and the paying up of capital. Of these the contract may be made in one state, while the capital is subscribed and paid up in a second, and the association is finally registered and the incidental formalities are performed in a third. The theory then provides us with no means of determining in which of these states the association is to be domestic<sup>1</sup>. Opinions have been expressed in favour of each of the various circumstances as the true test of personal law.

(a) *A juristic person is domestic in the country in which its contract of association was concluded.*

8. The principal argument which is usually employed in favour of the general principle that nationality depends on the place in which the acts of formation were performed would avail also to show that, amongst such acts, that which is decisive in fixing nationality is the contract of association. An intention must be implied, it is said, on the part of the parties to the contract of association, that their contract and its legal incidents should be governed by the law of the place where it was made, the *lex loci contractus*; and this intention, as a term of the contract by which the juristic person is constituted and regulated, is conclusive that the law in question is its personal law. "An association implies a contract," it has been said, "or at least a sum total of rights and obligations resulting from an initial contract. Is it not logical diligently to seek for the nationality which the parties intended to attribute to the society which they were creating?" The same idea has already been considered in connection with the question whether a juristic person can possess a personal law at all; it appears to be as unsatisfactory in its present as in its former application and for the same reasons. Nationality, in the restricted sense in which the word is used

(a) Nationality is determined by the place where the contract of association was concluded.

<sup>1</sup> Cp. Larombière, *Cong. Soc. par Act 1889, Comptes Rendus*, p. 238.

<sup>2</sup> Arminjon, p. 386, who however rejects this reasoning; cp. Brünard, *Cong. Soc. par Act 1889, Comptes Rendus*, p. 213.

here, ought to be treated as a quality that is intrinsic in the legal character of the juristic person as a subject of rights, and inherent in its legal relations with others ; and it ought not to be possible to assume, reject, or otherwise affect it by a mere expression of intention. Such intention on the part of the founders, even if it could be legitimately implied, might bind parties to the contract of association ; it could not bind third parties, strangers to the contract, and still less could it bind states with whose laws the juristic person might come into contact.

There does not, however, appear to be any conclusive reason why any such intention on the part of the founders should be implied. It would seem to be at least equally reasonable to imply that the founders intended that the personal law of the juristic person should be their own personal law, or that of the majority of them, with the rules of which, when the contract is concluded in a country in which they, or the majority of them, are not domestic, they are presumably better acquainted than they are with those of the *lex loci contractus*. Again, in the now frequent cases in which juristic persons are formed in one country for the purpose of discharging all their functions and carrying on all their operations in another or others, it would be more natural to imply that the founders intended that the juristic person should be governed, not by the laws of a country with which it was to have no further connection, but by the laws of the country in which the centre of its administration and the scene of its operations was to be situated, and with which, as prudent men, they would probably have made themselves acquainted.

(b) *A commercial association is domestic in the state in which its capital was subscribed.*

9. This opinion, although it has received considerable support from authors on the subject, has never been accepted judicially or practically applied. Its originator and principal advocate is M. Thaller, who gives it the following more lengthy expression. "The nationality of a commercial association is determined by the centre of its administrative business (*siège social*), which need not be in the country in which its operations are carried on (*le pays de l'exploitation*), but must

(b) The Nationality of a Commercial Association is determined by the place where its capital was subscribed.

be in that in which a part at least of its capital was subscribed, as to the sufficiency of which the courts shall decide<sup>1</sup>." The first part of this formula appears, however, to be redundant. The centre of administrative business, it is said, must be in the country of subscription; and this can mean nothing else than that if it is placed elsewhere, it should be considered to be so placed fraudulently and illegally, and therefore that it should be neglected in considering the association's legal position. In that case the association must either be denied personal status, or considered to have no nationality, or its nationality must be referred directly to the country of subscription. In short, if nationality depends on the centre of administrative business, and the centre of administrative business must be in the country of subscription, then the true and ultimate test of nationality is the country of subscription, and to introduce any reference to the centre of administrative business is an unnecessary elaboration, which tends only to conceal the fact of the actual rejection of the centre of administrative business as the true test of personal law.

Certain practical difficulties in the form of expression which M. Thaller has given to the theory have led to the proposal of other formulae substantially the same in principle but modified in detail. Shares in a commercial association are frequently issued and its capital subscribed in several states. To meet this case M. Thaller can only suggest that the founders should register their association and establish a centre of administrative business in each state in which a certain considerable proportion of the capital is subscribed<sup>2</sup>; and that what proportion is sufficient to make it necessary for the founders to register in the state is a question of fact for decision by the courts. The practical difficulties in the way of the suggestion are apparent. An association must have one responsible centre of its administrative business; with more than one it would be as unfitted for practical life as a body with two heads. To make it necessary to create several associations to carry out a single purpose is unnecessarily to hamper a beneficial process. The laws of different states,

<sup>1</sup> Thaller, *Sur la Nationalité des sociétés par actions*, *Annales de droit commercial*, 1890, part II., p. 266; cp. Surville and Arthuys, § 456, p. 143; *Trib. Amiens*, Judgment 9th November, 1901; *Journal des sociétés*, 1903, p. 20.

<sup>2</sup> Thaller, *loc. cit.* p. 264.

moreover, relating to the registration of commercial associations differ to such an extent that it would often be impossible to establish in two or more states associations which would possess any true identity, or to give effect according to the laws of those states to a single contract of association. Further, to refer to a decision of the courts upon a question of fact for a final test of nationality is to incur the danger of conflicting decisions which might saddle some associations with several nationalities, and leave others with none. In order to obviate these difficulties in the case of a subscription in more states than one, some reason must be found for selecting a particular state as that in which the association is to be domestic. With this object it has been suggested on the one hand that preference should be given to the country by whose capital the company has been principally maintained since its foundation<sup>1</sup>, and on the other that preference should be given to the state in which the shares of the association are first issued, and its original capital subscribed. M. Pineau for instance contends that whatever such associations may do after their constitution they are all constituted in the first place with the primary intention of appealing to capital in some particular state. He proposes, therefore, the following formula :

“The nationality of a juristic person is determined by the centre of its administrative business which need not be in the country in which its operations are carried on, but must be in that in which its shares were originally subscribed for, either in whole or in part<sup>2</sup>.”

The considerations by which M. Thaller and those who follow him arrive at their conclusions are on the one hand the intention of the subscribers, and on the other the intention of the state in legislating for commercial associations. Subscribers, it is said, should not be withdrawn from those laws whose protection they contemplated in advancing their capital and submitted to others of which they are ignorant. The value of the intention of the founders of a commercial association as a circumstance deciding its nationality has already been dealt with above. But there is here an additional circumstance to deprive that consideration of weight. Capital becomes more and more international. It is increasingly sent abroad for investment, either

<sup>1</sup> Sacopoulos, p. 177.

<sup>2</sup> Pineau, p. 150.

directly or by deposition with foreign bankers, so that the capital of a single commercial association may be contributed by capitalists in many different states; and under these circumstances there is no reason to suppose that the contributors have any particular knowledge of or desire for the protection of the laws of the country in which the ultimate formal subscription is made. The argument from the intention of the state is entitled to more weight. Laws, it is said, relating to commercial associations are enacted by a state to protect the capital of its subjects from the designs of fraudulent company promoters; and having been made with this intention they must be applied to all subscriptions of capital which take place within the territories of the state which made them. "Would it not," asks M. Thaller, "be wholly unreasonable that the (French) law of 1867 should cease to exercise its protecting influence, under the pretext that a French banker advises his client to subscribe for shares in a so-called German or Belgian company, when the day before that law, seeing the same banker offering people shares described as French surrounded the intended shareholder with a multitude of safeguards<sup>1</sup>."

If such an intention were actually present in the whole legislation of a state affecting commercial associations, no doubt it would be conclusive of the association's personal law, at any rate in the courts of that state; for if the state intends that the laws should apply to all associations whose capital is subscribed within its territories, that is conclusive that in the eyes of that state at least they are the association's personal law. But even so, in considering the international validity of the legislation in question we should still have to ask, Does that intention transgress against the rights of other states? and thus find ourselves referred to some test more fundamental than an expression of intention. It may well be questioned however whether the whole legislation of any state affecting associations does exhibit such an intention.

No such intention ever has been expressed by any state, and the supposed intention is therefore an implied intention if it exists at all. It is difficult, however, to see what grounds there can be for implying it. The whole legislation of a state relating to commercial associations is not enacted by it for the protection

<sup>1</sup> Thaller, *loc. cit.* pp. 263—264.

of its subjects' savings. One part is, no doubt, enacted with that intention, but a second part is enacted for the regulation of the constitution and capacities of the juristic person and the rights of the members *inter se*, and a third part is enacted to protect the interests of third parties, subjects of the state, with which the association may subsequently have dealings. It is the first part only that the state can reasonably be supposed to intend to apply to associations which apply for capital to its subjects; and the inference cannot be extended to the second or the third parts. A state is undoubtedly entitled to make what regulations it pleases for the subscription, within its jurisdiction, of capital to commercial associations. Such regulations relate to public order, or the rights of third parties, subjects of the state, since intending subscribers are still strangers to the association. They are therefore, on general principles, essentially matters for the local law, and not for the personal law at all. A commercial association must, no doubt, if it desires to obtain capital within the jurisdiction of a state, observe the laws which that state has made to govern such subscriptions; and on the principle that *locus regit actum*, a subscription made in accordance with those laws must be recognised in every other state as properly made. But it would be unreasonable to assume that the state in question intended that the fact of the subscription should subject the association to all sorts of rules of law which were enacted in respect of matters which have nothing to do with the subscription, and should fix it with them forever as its personal law. If it did so intend, it would be passing beyond the true province of its legislative activity, and its intention might be disregarded by other states.

In order to determine the nationality by reference to the intention of the state, it is necessary to determine to what associations the state intended that that part of its law of commercial associations should apply which was enacted by it in relation to the interests, not of third parties, including intended subscribers, but of the association itself. That part only of the law of the state will follow associations everywhere as their personal law; and only associations to which that part of the law applies will be domestic in the state. It will be seen hereafter that it may be urged with force that the best test of what associations a state intends to affect by its law relating to the association



itself is the place of the centre of administrative business. The law of the place in which shares are issued and capital subscribed must no doubt be observed in so far as it provides for the observance of certain formalities in the issued subscription in the interests of intended subscribers. But that is the limit of the argument from the intention of the legislature in relation to subscription of capital; it cannot be extended to make the place of subscription the test of personal law.

In addition to these considerations there are certain more practical objections to the theory under discussion. Even the formula proposed by M. Pineau does not completely get rid of the difficulty in the case of a company whose capital is subscribed in several states, for it is not impossible or unknown that the original subscription upon the company's institution should take place simultaneously in several states. Further, the suggestions of both MM. Sacopoulo and Pineau, though more practically convenient than that of M. Thaller, are less logical. If the fact that capital is subscribed in a country is to have one effect at one time, there can be no reason why, other things being equal, it should not have the same effect at another; and there is no essential difference between subscriptions of capital made at and after the institution of the company<sup>1</sup>. The proposed principle would apply moreover only to joint stock associations with capital divided into shares. If it be accepted for them, another and a different test must be sought for other associations although there is no essential difference in their juridical, as distinguished from their economical, characteristics. It does not even provide a test applicable to all companies with capital divided into shares. According to the laws of some states, of which the English company acts are an example, the subscription of capital is not a necessary incident to the formation of a commercial association, and if an association were to be formed under these laws without any subscription, there would be no means of determining its nationality. According to the laws of other states, of which the German law as to *simultan gründung* and the French law of 24th July 1867 are examples, the whole share capital may be retained in the founders' hands at the time of the institution, and need not be issued to the public till a later period; in such cases there might

<sup>1</sup> Cp. Mamelok, p. 221.

be in existence an association without a nationality, which would subsequently obtain one by the happening of an event which made no change in its juridical character. The theory, indeed, by making nationality depend on external and temporary circumstances such as the state of the money market at the time of its institution, refers it to circumstances which have no necessary relation to its legal character or practical functions. As it has been well said, the fact that a constitutive act was performed in a certain place ought not to have any influence on the nationality of a company, simply because it is an accidental fact which has no necessary connection with the nature or object of the company or with the discharge of its functions<sup>1</sup>.

- (c) *A juristic person is domestic in the country in which the public formalities attendant upon its constitution were performed.*

10. Many states have released certain classes of juristic persons, and especially commercial associations or those constituted in commercial form, from the necessity of obtaining an express authorisation or recognition from the state; but they continue nevertheless to exact from the released associations the performance of certain formalities, for the principal purpose of securing publicity as to their constitution and purposes. The nature of the formalities differs widely in different states, but in all alike they include the necessity for registration upon an official register, a process which may be taken as typical of the rest.

It is often said, and still more often assumed, that a juristic person is domestic in the state in which it was registered; and the proposition appeals by its simplicity. If it be examined, however, it appears to have no satisfactory foundation. In so far as it is supported by reference to the intention of the parties, it is open to the same objections as the theory in favour of the *lex loci contractus*. But perhaps the principal argument in its favour is that registration in an official register implies some sort of intention on the part of the state to authorise or recognise

<sup>1</sup> Diena, p. 261.

companies registered. If this argument is sound, the theory then becomes but a particular form of the theory first dealt with above, that a juristic person is domestic in the state in which it has received an express authorisation or recognition and is open to the same objections. But it may be contended with force that it is unsound. In so far as the theory is supported by reference to the intention of the state, that may be said of it, *mutatis mutandis*, which has already been said of other theories supported by the same argument. The state, no doubt, intends that its laws, which regulate the public formalities necessary for the formation of a juristic person, should be observed by every juristic person which is formed within its jurisdiction. They are laws relating to public order, or the interests of third parties, subjects of the state, and must be observed by every juristic person to which they are intended to apply, as part of the local law. They are within the proper sphere of the legislative activities of the state, and when the juristic person in question has observed them, it must be acknowledged by every other state to have been properly constituted as regards the performance of public formalities attendant on its constitution. But no inference can be drawn that, because the state intended to apply this part of its law to a juristic person, it also intended to apply to it the whole of its law relating to juristic persons, and that that law is the personal law of the juristic person. Nor can any inference be drawn that the state intended that the part of its law regulating the public formalities in question should apply to any juristic persons other than those that were formed within its jurisdiction. Furthermore, it does not seem reasonable to imply any intention to authorise on the part of the state in providing for registration. The purpose of such formalities as are required from commercial associations by states which have released them from the necessity of an express authorisation is to enforce publicity in the interest of the public. The association performs them, while the state remains a passive spectator, neither approving nor disapproving; and indeed one of the motives that led states to abandon the system of express authorisation in the case of commercial associations, was the desire to avoid the appearance of giving official sanction or approval to undertakings concerning which there could be little official knowledge and over whose operations there could be little official control.

It might perhaps be said, somewhat artificially, that in providing for the formation of commercial associations, the state authorised them *in futuro*, and that the authorisation became realised in the case of each association upon its registration. In certain cases, also, owing to the special form of the process of registration, it may appear that the registration does in fact convey an express recognition or authorisation by the state. In either case, the theory would still be open to the objections which have already been advanced to the general proposition, that a juristic person is domestic in the state in which it is expressly authorised.

Although, however, the place of registration may not be conclusive as to the general personal law of a juristic person, in one respect it must permanently affect it. As regards the manner of registration and the other formalities which attend the constitution of the juristic person it is the *lex loci actus* that must prevail, and on the general principles of private international law the validity and sufficiency of such acts must everywhere be referred to it. It is necessary to remember that whatever other law may be accepted as the general personal law of a juristic person, questions relating to the validity and sufficiency of the forms of the acts by which it was instituted must be referred to the rules of law of the place or places in which those acts were performed; and if its personal law in other respects be the law of some other place, then its total personal law is to that extent a complex of the laws of more than one state.

*A juristic person is domestic in the state in which  
it is domiciled.*

II. In discussions concerning the nationality of foreign juristic persons, the word domicile has been commonly used to express two or three different ideas, a circumstance which has caused not a little obscurity. When it is said that a juristic person is domiciled in a certain country, it is sometimes meant that it has there a permanent home, a fact evidenced by the natural circumstances of its existence; sometimes it is meant only that the laws of that country are the personal law of the juristic person; and sometimes it is meant that it is subject to the local laws in some particular manner, as for the purposes of

(a) Nature of  
domicile of  
a juristic  
person.

jurisdiction or taxation, although in this case the domicile is usually qualified as a business domicile, or a domicile for the purposes of jurisdiction, or taxation. Used in the second of these senses, the word implies no special natural circumstances in the existence of the juristic person which attach it to the state. The word is thus given a different meaning from that which is commonly given to it in connection with natural persons. When it is said that a natural person is domiciled in a certain country, a double meaning is commonly implied. It is meant in the first place that he has a permanent home there, which is a question of fact; it is also meant that that fact has the consequence of making the rules of law of that country his personal law, which is an inference of law. Those who contend that a juristic person is incapable of having a permanent home, are accustomed nevertheless to use the word domicile to imply the inference of law without the fact, so that when it is said that a juristic person is domiciled in a country, nothing more is meant than that the rules of law of that country are its personal law. Domicile in this sense provides of course no test of personal law, for to say that the personal law of a juristic person is that of the country in which it is domiciled would mean no more than that it had the personal law of the country of which it had the personal law, and would carry the matter no further. Used in this manner, indeed, the word becomes an unnecessary synonym, the only purpose of which is to bring into apparent but unreal agreement with the theory that the personal law of natural persons is determined by their permanent home, unrelated theories which refer the nationality of juristic persons to totally different circumstances. An instance of this use of the word has already been met with in the second clause of the Draft International Code providing for the recognition of foreign companies adopted by the International Law Association, which provides that "A foreign company shall be deemed to be domiciled in the country in which it was incorporated." Professor Westlake appears to use the word in the same sense, when, referring to the law from which an artificial person derives its existence, he says, "that law is its personal law, or in other words, it is domiciled in the country of that law<sup>1</sup>." In both these passages domicile

<sup>1</sup> Westlake, p. 359; cp. also Rattigan, p. 44.

means a legal inference only, not dependent on any natural facts, and the actual meaning of the phrase is that the place of the juristic person's place of incorporation, and not the place of its permanent home regarded as a natural fact, is to be the test of its personal law. The same use of the word is common in American decisions. In the *Bank of Augusta v. Earle* it was asserted as part of the general theory of foreign corporations that a foreign corporation "must dwell in the place of its creation and cannot migrate to another sovereignty<sup>1</sup>." In subsequent decisions we find this principle confirmed and developed. "A corporation," it is said, "is an artificial being and has no dwelling either in its office, its counting-house, its depots, or its ships. Its domicile is the legal jurisdiction of its origin, irrespective of the residence of its officers or the place where its business is transacted. It retains that domicile until it ceases to exist<sup>2</sup>"; and "A corporation can have no legal existence outside the authority which has created it. Its place of residence is there and nowhere else. Unlike a natural person it cannot change its domicile at will<sup>3</sup>." In such observations as these the primary theory is that a corporation is domestic in the territories of the state by which it was created; from this a conclusion is drawn, as a legal fiction, that it is also domiciled therein. The question of domicile is treated as one not of fact, but of law; and nothing more is meant by saying that a corporation is domiciled in the legal jurisdiction of its origin, than that it is domestic there. The introduction of the word domicile clearly adds nothing to the proposition. It is a superfluous addition; and to borrow the word from the law of natural persons and to deprive it of its meaning in its original surroundings in order to employ it to express ideas which can be adequately expressed without its assistance, is to court confusion. The use of the word domicile to describe subjection to local laws in particular matters such as jurisdiction and taxation is open to similar

<sup>1</sup> *Bank of Augusta v. Earle*, 13 Peters 519; cp. Wharton, § 105. "A corporation has its domicile in the state establishing it etc." Elsewhere (§ 48 a) he says, "a corporation is deemed to have its local residence (or domicile if that term can be used with respect to a body purely artificial) in the place where its business is centred, and within the jurisdiction by which it is created"; but he does not elucidate the situation of the corporation in case its business is centred without that jurisdiction.

<sup>2</sup> *Merrick v. Van Santvoord* (1866), 34 N.Y., p. 208.

<sup>3</sup> *Insurance Co. v. Francis* (1870), 11 Wall. at p. 216.

objections: "Domicile for purposes of jurisdiction," or "for purposes of taxation," is frequently spoken of as if it were an attribute distinct from that of domicile for the purpose of determining personal law; so that one might have several domiciles for distinct purposes. No doubt a juristic person or any other person may under certain circumstances be subject to the jurisdiction of the courts or to taxation in a country within the territories of which it is not domiciled to the full extent of having there a permanent home; but it is unnecessary and inaccurate to describe these circumstances as the possession of a domicile. In order to render a juristic person liable to the jurisdiction of the courts of a country for certain particular reasons it is no doubt necessary that it should be domestic in that country, and whether it is domestic or not, as it will be seen, is generally considered to depend on whether it is domiciled in that country in the true sense and has there a permanent home. Such must be the case, for instance, in order that the courts may be able to preside over the liquidation of the juristic person or to have jurisdiction over internal disputes between it and its members, or between the members themselves. As a matter of fact questions relating to the domicile of a juristic person have been discussed in practice more often for the purpose of deciding whether the juristic person was subject to the jurisdiction of the local courts in such matters as these, than for the purpose of deciding what was its personal law. But

(b) **Domicile and residence.** domicile in the full sense is not in general necessary to found jurisdiction over a foreign juristic person, in the local courts, or to render it liable to taxation; and under most systems of law the test of jurisdiction and of liability to taxation is not domicile at all. According to English law, for instance, all that is necessary in order that a court may have jurisdiction over a foreign defendant, is that process of summons should have been served upon him while within the territories of the state from which the court derives its authority. It is difficult to imagine circumstances which would constitute the presence of a juristic person without constituting its residence also, although the holding of a stall for seven days at an exhibition seems to approach the border line<sup>1</sup>; and so whenever a juristic person can be said to be present in a country it may

<sup>1</sup> Cp. *Dunlop Pneumatic Tyre Co. Ltd. v. Actiengesellschaft &c.*, Cudell, post, p. 223.

usually also be said to be resident there. It is, therefore, substantially accurate to say that according to English law residence is the test of jurisdiction over foreign corporations. But residence is not necessarily the same thing as domicile; the former may be temporary, the latter is permanent; of the former there may be many, of the latter there can be only one. To speak, therefore, of domicile in connection with questions of jurisdiction of English courts, with whatever qualifications, is to use one name for two things, the test of jurisdiction or liability to taxation or other subjections to the local law, which is residence (or presence); and the test of personal law, which is permanent home. It seems better to confine the use of the word to the latter meaning; its use in connection with juristic persons will then be identical with its common use in connection with natural persons, and it will always have the same meaning.

(c) Natural domicile of a juristic person at the centre of affairs.

In the heading to this section, therefore, and elsewhere hereafter, by the domicile of a juristic person is meant its permanent home, the situation of which is a natural fact depending on its constitution and

character, and on its relations with others. It has indeed been contended that a juristic person is incapable of possessing domicile in this sense, a theory which has been responsible for its use in the second sense referred to above. A fictitious person, it is said, can have no real domicile, and if one be attributed to it, it is by fiction of law only. It is common to find, however, that those who advance this opinion admit at the same time not only that a domicile must be attributed to it, but that its location depends on the natural circumstances of the juristic person. While asserting that the idea of domicile which is founded on the habits and relations of the natural man is inapplicable to juristic persons, they admit that it is necessary to assign an artificial domicile, formed by analogy; that its location is to be determined in some cases, such as hospitals, by some clear connection between the legal person and the territory, and in others by the charter, or by the central point of the enterprise<sup>1</sup>. We have then a fiction which it is necessary to feign, and which is an expression of natural facts. It seems simpler to say at once that the domicile of a juristic person is no fiction, no

<sup>1</sup> Cp. Dicey, rule 19 (2), p. 163 et seq.; and Foote, p. 177; following Phillimore, *International Law*, 2nd edit., vol IV., p. 142; and Savigny, § 354 (3).



artificial attribution of law, but real in the same sense that the domicile of a natural person is real. The force of circumstances constantly makes it necessary to consider a juristic person as resident at some particular place. It is natural and necessary that those who contract legal relations with it should contemplate it as itself present at the centre or centres from which it carries on its activities. The real elements in its personality must have a real location. It has already been seen how in America, for instance, the theory that a corporation can reside only in the territories of the state which created it has, in relation to questions of jurisdiction, given way before the growing conviction that it does in a literal and unmetaphorical sense reside wherever it has an agency or branch office, so that "it would seem that a manufacturing company which maintains an established location here, and an agent, for the purpose of selling its products or facilitating their sale, carries on a part of its ordinary business here, and has a business domicile here<sup>1</sup>"; business domicile meaning apparently no more than residence. Where there is only one such residence that residence is the domicile of the juristic person; where there is more than one, the circumstances of the juristic person will point out which is the principal centre. Its activities, like those of a natural person, naturally concentrate at some one place which is the centre of its legal relations. That principal centre is its domicile or permanent home, the secondary centres are subsidiary residences only<sup>2</sup>. It appears to be now generally admitted that in the words of Von Bar "Domicile is also an attribute of juristic persons (as well as of natural persons); in their case, too, we can conceive of a centre of their activity, that is of their activity that belongs to them as juristic persons<sup>3</sup>." To speak, therefore, of a foreign company as "deemed to be domiciled in the country in which it was incorporated<sup>4</sup>," or in any other place in which its principal centre of affairs is not situated, is to contradict a fact with a legal fiction which only serves to conceal that domicile is being rejected as a test of personal law in favour of some other test.

<sup>1</sup> *Southern Cotton Oil Co. v. Wimple* (1890), 44 Fed. Rep. at p. 27.

<sup>2</sup> Cp. Fiore, § 918; Dicey, p. 163; Pineau, p. 153; Vavasseur, p. 348.

<sup>3</sup> Von Bar, p. 121, § 47; also Calvo, *Dictionnaire de Droit International*, vol. 1., *tit. Domicile Social*.

<sup>4</sup> Cp. § 2 of the Draft Code of the International Law Association, 1906.

A juristic person, then, can have a domicile in the sense of a permanent home, which is at the centre of its affairs. According to the theory which heads this section and which is now prevalent amongst continental jurists, the word domicile used of a juristic person should imply not only this statement of fact but the inference of law also that it is domestic in the country in which it has its centre of affairs, and that the law of that country is its personal law. "It is the country of a company's domicile," say MM. Lyon-Caen and Renault, "that must serve to fix its nationality. Strictly speaking, a company has not nationality like an individual; it has a domicile which must serve to determine the state with which it is connected, and, in consequence, the laws which are applicable to it<sup>1</sup>." Domicile, it is said, affords a test of personal law which is practically convenient and theoretically sound. In the case of natural persons, personal law depends either on the nationality acquired as *jus sanguinis* or *jus soli*, or on domicile. Juristic persons have no nationality, at least as *jus sanguinis* or *jus soli*; but they have domicile, and to refer to it as determining their personal law is to preserve uniformity between the law of juristic persons and the law of natural persons. Domicile has characteristics as a reasonable and scientific test of nationality which other proposed tests do not possess. It is not like authorisation or recognition, or the place of performance of any of the constitutive acts, an external incident in the history of a juristic person, or one affecting it partially or temporarily only. It is a question of fact which is independent of the intention of the founders or members of the juristic person. It is a permanent attribute of the legal personality of the juristic person<sup>2</sup>. Being closely connected with and conditioned by its purpose in existence, and having great effect upon the exercise of its civil capacity, it affects the whole of its existence. The personal law of a juristic person consists of the rules of law which regulate its internal constitution and general capacities, and that portion of a state's legislation relating to juristic persons which deals with these matters, as distinguished

<sup>1</sup> Lyon-Caen and Renault, § 1167; cp. Chervet, p. 128; Brocher p. 101; Belgian law of 18th May, 1873, art. 128; *Code Comm. It.*, art. 230; *Code Comm. Port.*, arts. 109—111, *Code Comm. Roum.*, art. 239; Nevada Act 44 of 1889.

<sup>2</sup> Cp. Pic, p. 583; Pineau, p. 124.

(d) A juristic person is domestic in the country in which is its natural domicile.

from that portion which deals with the interests of the public, affects its domestic juristic persons alone. In considering what juristic persons are domestic in that state, and have a personal law composed of those rules of law, it is necessary to consider what was the intention of the particular legislature as to the juristic persons to be affected by that portion of its law; and it appears to be most reasonable to suppose that it intended those juristic persons, and those only, to be affected thereby, which have their permanent and principal centre of affairs within its territories, and thus operate under its protection and enjoy the other advantages it provides. These alone have any permanent connection with it, and permanent legal relations with its subjects<sup>1</sup>.

12. For such reasons the opinion is now widely accepted, and continues to gain support, that the true test of a juristic person's nationality and personal law is not its place of origin or any other matter but its domicile, which is the centre of its affairs. But there is not the same agreement as to what place in particular is its true centre of affairs. As to this various opinions are maintained, and in particular we find it said that a juristic person is domiciled (*a*) at the place at which its functions are discharged (*lieu d'exploitation*), or (*b*) at the place which is fixed by its constituting documents as its seat, or (*c*) at the centre of its administrative business (*siège social*). When all three are in the same country no difficulties can arise, but when they are all in different countries or one is in a different country from the others, it is necessary to determine which of the three is to prevail in fixing the juristic person's nationality. In the United States alone the principle that a juristic person is domestic in the country in which it is domiciled has found no favour. It is fully recognised that a corporation, like a natural person, can have residences or so-called business domiciles, and that these will have the same effect upon its juridical life in such matters as jurisdiction over disputes involving third parties that they have upon the life of a natural person. But the further step has never been taken of recognising that the principal residence or permanent home should have the same effect upon the juridical life of both, and that as it determines the personal law of the one, so it should

Theories as to  
the position  
of the centre  
of affairs.

<sup>1</sup> Lyon-Caen and Renault, *loc. cit.*

determine that of the other also. Opinion is divided, as has been said, between the centre of its administrative business and the scene of its operations as to the true domicile of a juristic person. In the United States both are alike disregarded in favour of a strict adherence to the principle that a juristic person is domestic in the country by the law of which its fictitious personality was created. Thus the transfer of its principal office, or of most or even all of its business from one state into another, has been held to leave it still a foreign corporation in the latter state<sup>1</sup>. If it transfers its business from the state in which it was created to another, for the purposes of Federal jurisdiction it remains a citizen of the former state and does not become a citizen of the latter<sup>2</sup>.

13. *A juristic person is domiciled at the place at which it discharges its functions.*

The centre of the affairs of a juristic person is that place at which it principally manifests its personality; and at first sight it is not unnatural to say that the principal and most obvious manifestation takes place at the scene of its operations, where its functions are discharged and its legal relations with third parties contracted. Accordingly, the theory that the domicile of a juristic person is at the scene of its operations has met with considerable support, both legislative<sup>3</sup>, judicial<sup>4</sup>, and theoretical<sup>5</sup>.

(a) A juristic person is domiciled where it performs its functions.

<sup>1</sup> *Merrick v. Van Santvoord* (1866), 34 N.Y. p. 208; *New Hampshire Land Co. v. Tilton* (1844), 19 Fed. Rep., p. 73; *Hanna v. International Petroleum Co.* (1872), 23 Ohio St., 622; *Newbury Petroleum Co. v. Weare* (1875), 27 Ohio St., p. 343.

<sup>2</sup> *Insurance Co. v. Francis* (1870), 11 Wall. 210; *Pacific Railway Co. v. Missouri Pac. Ry. Co.* (1883), 23 Fed. Rep., p. 565; *Booth v. St Louis F.E.M. Co.* (1889), 40 Fed. Rep., p. 1; *Chicago and N.W. Ry. Co. v. Chicago and Pacific Ry. Co.* (1874), 6 Biss, p. 219; *Railway Co. v. Whitton* (1871), 13 Wall., p. 270; *Wilkinson v. Delaware, L. and W. Ry. Co.* (1884), 22 F.R., p. 353; *Hatch v. Chicago Rd. Co.* (1868), 6 Blatch., p. 105.

<sup>3</sup> e.g. § 286 of the Commercial Code of the Argentine Republic of 1889, "societies constituted in foreign countries which carry on their principal business in the Republic shall be considered to be national societies, subject to the dispositions of this code": cp. also art. 110 of the Commercial Code of the Kingdom of Portugal of 1888.

<sup>4</sup> *Reichs-Oberhandelsgericht, Leipzig*, Judgment of 25th November, 1871; *Clunet*, vol. 1., p. 82; *Cour Cass.* Judgment of 10th February, 1863; *Sirey* (1863), 1. 199.

<sup>5</sup> *Lyon-Caen, Journal des sociétés*, 1880, p. 36; *Despagnet*, § 64.

"What is meant by the domicile of a company?" ask MM. Lyon-Caen and Renault, "it is the principal seat of its business operations (*exploitation*)<sup>1</sup>."

A company is foreign, say MM. Asser and Rivier, "when it has its principal establishment abroad, that is to say, the centre of its business operations, and not its bureaux or the majority of its shareholders<sup>2</sup>."

In support of this opinion it is urged that it is on the scene of its operations that a juristic person comes into closest and most frequent contact with third parties; that the state within the territories of which that scene of operations is situated is concerned to protect the interests of those third parties, its subjects; and that it is, therefore, reasonable to suppose that it intends the laws which it has enacted in relation to juristic persons to control and to be the personal law of all such juristic persons as, having their scene of operations within its territories, are brought into contact with those whose interests it is its business to protect<sup>3</sup>.

This reasoning, however, appears to be but a re-statement of the principle that a juristic person must in every country observe those rules of law which relate to the interests of third parties, members of the public. Every state is undoubtedly concerned to protect the interests of its subjects, but it cannot be inferred from that principle that a state intends the whole of its law of juristic persons to apply to all juristic persons having their scene of operations within its territories. Only a part of its law is enacted in the interests of members of the public: and the true inference is that that part alone is intended to apply to all juristic persons entering into legal relations with members of the public. No conclusion can be drawn as to the applicability of that part of the law of the state which relates to the juristic person itself as distinguished from its relations with third parties; and it is that part which forms the personal law of a juristic person, and when applied, stamps the juristic person as domestic.

There are other and more practical difficulties in the way of the theory. A commercial association may do business in a

<sup>1</sup> Lyon-Caen and Renault, § 1167.

<sup>2</sup> Asser and Rivier, p. 197; so also Weiss, p. 418.

<sup>3</sup> Cp. Rolin, vol. III., No. 1272; Lyon-Caen and Renault, p. 823.

country with no law of juristic persons, or in one totally uncivilized. What then is to be its nationality and its personal law? Certainly many mining companies, for instance, which have been used to consider themselves English and subject to the English company acts, would be surprised to discover that they were in truth Persian, or Nicaraguan, or Chinese, because their mines were situated in those countries; and in the last case, at least, they must be puzzled to discover in Chinese legislation the rules of their personal law. A commercial association may do a permanent business in several states equally, as in the case of a railway company working an international line. In such cases it may be impossible to distinguish in importance between the several centres, and to say which is to prevail in determining the company's nationality; and the only logical conclusion may be that the association has multiple nationality. Again, an association may do business in many states, and the amount of business done in each state may rapidly fluctuate. This is especially the case with commercial associations which carry on business without any plant, such as Insurance or Banking Companies; it is also the case with ship-owning companies<sup>1</sup>. If the doctrine is to be applied rigidly to them, their nationality must depend on the proportion of business done in each state respectively; it may therefore fluctuate rapidly; and it must be impossible to tell what it is at any given moment without taking an account of the state of the company's business at that moment<sup>2</sup>. Such a conclusion is clearly absurd; but in order to escape from it, it can only be suggested that in case of doubt it is for the courts to decide which is the principal scene of operation<sup>3</sup>. To attempt to surmount such difficulties by reference to a judicial decision of fact is not to surmount them at all. The difficulty is that under such circumstances the theory provides no means at all of discriminating between various nationalities, or no means which can be applied in practice; and if then the burden of discrimination be thrown upon the courts without furnishing them with an adequate principle upon which to act, conflicting decisions are inevitable, leaving some companies with double nationality and

<sup>1</sup> Cp. Sacopoulo, p. 173; Pineau, p. 133; Mamelok, p. 222.

<sup>2</sup> Cp. Surville and Arthuys, § 456; Pic, p. 585.

<sup>3</sup> Lyon-Caen and Renault, § 1167.

some without any. Other suggestions for avoiding such difficulties have been made which practically amount to an abandonment of this theory in favour of the centre of administrative business. Thus it has been said that when there are several places in which a juristic person discharges its functions, and these are of equal importance, the centre of its administrative business must be referred to as determining its nationality<sup>1</sup>. As to this it is necessary only to say that it appears to be needlessly elaborate. If the centre of administrative business is the true test of nationality when there are several scenes of a juristic person's operations, there is no reason why it should not be the true test also when there is only one such scene; if it is to rule in the case of some juristic persons there is no reason why it should not rule in the case of all.

To hold that all juristic persons which have their principal scene of operations in a certain country are domestic in that country would clearly place very great obstacles in the way of the circulation of capital. Investors must in many cases hesitate to subscribe to associations formed for the purpose of carrying on business abroad when it is inevitable that the proposed association should be withdrawn from the laws with which they are acquainted and subjected to the laws of the country in which the operations are to be conducted, which must be less familiar to them, and may be barbarous. Recognising this, MM. Lyon-Caen and Renault acknowledge that some relaxation is necessary in their doctrine. They admit that there may sometimes be motives of great practical importance for submitting an association to the laws of some other country than that in which its business is to be carried on, one of which is the desire to inspire confidence in investors. In such cases, they say, the courts should recognise that the laws of the country in which the juristic person has by its constitutive documents fixed its centre of administrative business are its personal law, if by the same documents it has expressly submitted itself to them<sup>2</sup>. Under certain circumstances,

<sup>1</sup> Rolin, vol. III., No. 1277.

<sup>2</sup> Lyon-Caen and Renault, § 1167; and Report of Lyon-Caen to the Institute of International Law on Conflicts of Laws relating to joint stock companies, *Annuaire de l'Institut*, 1889-1892, vol. II. at p. 158; cp. also Resolution of Congress of Joint Stock Companies at Paris in 1900. "The Nationality of a joint stock company should be determined by the country in which it has its principal establishment, or by the country of its true seat (*siège social*), fixed by its statutes."

that is, they substitute centre of administrative business for scene of operations as a test of nationality and leave the circumstances under which the substitution is to be made to the discretion of the juristic person or its founders. The suggestion suffers from the defect that it treats the nationality of a juristic person as determinable by an arbitrary expression of intention, and not as a quality intrinsic in the personality of the juristic person and not to be affected by external control. Like that of M. Rolin it appears to be also needlessly elaborate. If centre of administrative business is ever adequate to fix nationality independent of scene of operations, why should it not always be so?

*The domicile of a juristic person is at that place which is fixed by its charter or other constituting documents as its seat.*

The opinion has been maintained, especially by German jurists, that the domicile of a juristic person must be fixed once and for all by its constituting documents, and that the place therein named remains its domicile, wherever its scene of operations or its centre of administrative business may afterwards come to be<sup>1</sup>. Domicile is thus reduced to a pure fiction, and nationality and personal law are determined by an arbitrary choice, and not by the characteristics of the legal personality of the juristic person. For these reasons the opinion can scarcely be accepted as satisfactory<sup>2</sup>. Why should a juristic person be permitted to select its nationality in this manner, or indeed in any other manner, while a natural person is not permitted to do so? In the one case as in the other it should be recognised that domicile is a natural characteristic and cannot be affected by agreement or an expression of wishes or intentions. Von Bar has well defined the true effect upon the domicile of a juristic person of special provisions in its constituting documents. "Such special provisions," he writes, "except in so far as they are guaranteed by treaty, have

(b) The domicile and centre of affairs of a juristic person must be fixed by documents.

<sup>1</sup> Cp. Savigny, § 354; Staub, *Kommentar zu allgemeine deutsche H.G.B.* (1896), pp. 373, 414; Ring, *Das Reichsgesetz betr. die Kommanditgesellschaft auf Aktien*, vol. II., p. 185; *sed contra*, Judgment of Reichsgericht, 9th March, 1904 (*Juristische Wochenschrift*, 1904, p. 231); so Ratigan, p. 45, "as a rule, the question (of domicile) is found to be settled by the charter of their constitution or by special legislative enactment."

<sup>2</sup> Cp. Vasseur, p. 347; Mamelok, p. 225; Lehman, *Archiv für bürgerl. Recht*, ix., p. 356; Holdheim, *Motive zum deutsche B.G.B.*, I., p. 77.



no absolute international validity. They can only be regarded as *prima facie* proof of the domicile that is alleged<sup>1</sup>. A decision of the Swiss Bundesgericht contains a clear expression of the same principle: "The statutes of a joint stock company," it was said, "are of course decisive in the first place as to the position of its seat. Special circumstances must be shown in order to establish that the provision of the statutes as to the seat of the joint stock company are inconsistent with actual fact, a mere fiction resting its legal relations on an evasion of the law as to their true centre<sup>2</sup>." The special provision is *prima facie* evidence, but if it appears that in fact the domicile of the juristic person is at some place other than that at which it is fixed by the special provision, the fact overrides the presumption. A special provision does not therefore obviate the necessity for arriving at some principle as to what place is the domicile of a juristic person in fact, and even if a special provision were conclusive as to the position of a juristic person's domicile, it would still be necessary to seek some principle for determining domicile in cases in which there was no such special provision.

*The domicile of a juristic person is at the place at which the centre of its administrative business is situated.*

The place at which a juristic person discharges its functions is the centre of its economic activities only. The true centre of its legal activities is the place at which its administrative business is conducted. It is there that its personality manifests itself, for it is there that its organs operate, directing its operations and controlling its policy. The real elements in its personality have their real location there, for it is there that its will, which exists independently of the wills of its members, is expressed by resolution of its governing bodies or of the general assembly of its members. The centre of its administrative business is thus no accidental or external feature in its character or circumstances. It is the place at which all its legal relations, internal or with third parties, are

(c) A juristic person is domiciled at the centre of its administrative affairs.

<sup>1</sup> Von Bar, p. 121, § 47; but cp. his opinion expressed at the Conference of the Institute of International Law 1891. "It is necessary to give preference to the domicile whilst presuming that the domicile is to be found at the seat indicated by the statutes." *Annuaire de l'Institut*, 1889-1892, vol. II., p. 162.

<sup>2</sup> Judgment of 22nd July, 1889. *In re* the Liquidation of the *Société Laitière de l'Est*, A.S. xv., N. 79; s.c. Clunet, 1893, p. 240.

concentrated, and thus it forms an appropriate test of the quality of nationality which, as it has been said, should be intrinsic in its character and inherent in its relations with others. The fact that a juristic person thus lives its legal life at a place makes an obvious connection between it and the laws of the country in which that place is situated: and it is natural to suppose that the state in enacting those laws intended that, in so far as they relate to the internal regulation of a juristic person and to the legal regulations of its members with each other and with the juristic person itself, they should apply to those juristic persons whose internal affairs are conducted, whose personality expresses itself and whose constitution functions within the territories to which those laws apply, and whose legal relations towards its members and of its members towards each other are there regulated and controlled.

That the centre of administrative business is the true domicile or permanent home of a juristic person and is the test in consequence of its personal law is for those reasons now the most favoured opinion<sup>1</sup>.

"The only system," says Diena, "which is truly national and wholly in conformity with juridical principles is that which determines the nationality of a company by the principal centre of its administrative business (*sedes sociale*)<sup>2</sup>," and in these words he summarises the opinions of the majority of those who have dealt with the subject.

The theory has the advantage of being clear, comprehensive

<sup>1</sup> Cp. Fiore, § 417; Surville and Arthuys, § 456; Von Bar, § 47; Calvo, vol. II., p. 227, note 2; Vavasseur, p. 349; Pic, p. 585; Arminjon, pp. 396, 407; Pineau, p. 139; Mamelok, p. 226; Sacopoulo, p. 175; Deloison, *Traité des Sociétés Commerciales*, vol. I., No. 164; Chervet, p. 130; Duvivieux, *Faillite des Sociétés*, p. 259; Isay, *Die Staatsangehörigkeit der Juristischen Personen* (1907); Reichsgericht Judgment of 5th June, 1882 (*in re* Rumänischen Eisenbahnaktiengesellschaft; Civils, VII., p. 68; *Cour Cass.* Judgment of 20th June, 1870, Dalloz, 1870, I. 416; *Cour Cass.* Judgment of 22nd December, 1896, Clunet, 1897, p. 364; *Trib. Seine*, Judgment of 17th July, 1897, Clunet, 1898, p. 341. German Code of Civil Procedure, § 19, "unless some other seat is plainly discoverable, the place where the management of the business is carried on is held to be the seat"; Indian Code of Civil Procedure (1882), act XIV., § 17, explanation II.; rule 5 of rules relating to conflicts of law concerning joint stock companies adopted by the Institute of International Law in 1891, "The country of origin of a joint stock company must be considered to be the country in which the legal centre of its administrative business (*siège social légal*) is situated in good faith (*sans fraude*)."

<sup>2</sup> Diena, pp. 265, 318.

and readily applicable in practice. In the great majority of cases the determination of the situation of a juristic person's centre of administrative business must be a very simple question of fact: other cases in which the organs of the juristic person are distributed or concealed may present more difficulty, but the difficulty is in the determination of the facts, not in the application of the theory. The only case in which the theory would seem to fail to supply an answer to the question as to the nationality of a juristic person is that of a juristic person which possesses two or more centres of administrative business of equal importance. Such a case must be as rare in practice as cases of Siamese twinning amongst natural persons, and for the same reason, that persons with one body and two heads are ill-adapted for the practical business of life. But it is not impossible that such cases should occur. A French *Société en nom collectif* might for instance consist of three partners, each of whom conducted the partnership business in a different country, independently of his partners. Must such a juristic person be considered to have three nationalities and three personal laws, one for each of its centres of administrative business, or is it an outcast without any nationality? It has been suggested that under such circumstances the centre of administrative business must be abandoned in favour of some other test, such as the principal scene of the juristic person's operations<sup>1</sup>. The latter circumstance would probably in such a case be just as difficult to determine as a question of fact as the centre of administrative business. But apart from any practical difficulty, the suggestion does not appear to be logical. If the centre of administrative business is ever the right test, there is no reason why it should be here abandoned; and if the scene of operations is ever the wrong test, there is no reason why it should be here adopted. It seems better to realise that the difficulties of the situation are due rather to defects in the accepted views as to the nature of juristic persons than to any defect in the theory that a juristic person is domiciled at its centre of administrative business. The application to such a special case of the latter theory, which is after all no more than the juridical expression of a natural fact, reveals that it is impossible to consider such an association with more than one centre of business of equal importance as a single juristic person. It is in fact several

<sup>1</sup> Arminjon, p. 419.

distinct persons, with several personalities, one for each of its equivalent centres of business : and if in disregard of this fact we insist for technical reasons on considering it as a single person, we must not be surprised to find that we are involved in anomalies when we come to reconcile that view with other principles. One such anomaly is that the juristic person must have several nationalities.

It may be objected to the principle under discussion that inasmuch as the centre of administrative business of a juristic person can be placed by the founders in any country they please, it enables the nationality of a juristic person to be determined by an arbitrary choice, regardless of its character and purposes<sup>1</sup>. That nationality should be determinable in this manner is, as has already been seen, both theoretically unsound and practically inconvenient ; theoretically unsound, because nationality should be regarded as a quality inherent in the character of a juristic person as of a natural person ; practically inconvenient, because it would enable founders freely to evade the laws of their country and make it impossible for any country to maintain a rigorous law of juristic persons. The practical importance of the objection is, however, very slight. The situation of the centre of administrative business of a juristic person is a matter of too great importance to its welfare to permit of its being lightly dealt with. It is a matter of vital interest that it should be in some convenient place and often it is absolutely fixed by the necessity of inspiring confidence in investors and of obtaining capital in a particular country. Founders, then, are not likely to risk the whole prosperity of a juristic person by fixing the centre of its administrative business arbitrarily in some inconvenient place, for the sole purpose of obtaining easier or cheaper terms of incorporation. Nor does the objection appear to be theoretically sound. No doubt, according to the principle, founders can fix the centre of administrative business in any place they please, and the nationality of the juristic person is subsequently determined by the position of that centre. It is true therefore to say that indirectly the choice of the founders affects the nationality of the juristic person. But

<sup>1</sup> Lyon-Caen and Renault, No. 1167; Weiss, pp. 417—419; Rolin, vol. III., Nos. 1270—1272; Calvo, vol. II., p. 402.

to say this is not to say that the nationality of the juristic person depends upon the founder's choice. It depends upon a question of fact, the position of the centre of administrative business. It is determined by a circumstance in the existence of the juristic person, and it can only be altered, if at all, by an alteration in that circumstance. The founders or members of a juristic person cannot according to this principle fix its nationality in a purely arbitrary manner, as they would according to the principle which would leave the true centre of administrative business to be decided by the constituting documents alone. By fixing the centre of administrative business here or there they can indirectly stamp the juristic person with this or that nationality, but as a stable element in its character, not as a formal label. They choose its domicile in that sense only in which a natural person chooses his, when he chooses the situation of his permanent home: and to this sort of choice the objection in question is no more applicable in the case of a juristic person than it would be in that of a natural person.

14. In view of the objection, however, certain modifications in the principle have been proposed, in order to diminish the

Modifications  
proposed to  
the preceding  
theory, limit-  
ing the free-  
dom of choice  
of a centre of  
administrative  
business.

freedom of choice which it allows to juristic persons as to their nationality and to prevent fraudulent evasion of a country's law of juristic persons by its subjects. The suggestions made for this purpose have taken the form of proposed limitations as to the situation in which the centre of administrative

business may be placed. Nationality, it is said, is determined by the centre of administrative business, but that centre must be in such and such a place. One of these proposals has already been considered, that of M. Thaller, according to which the carrying on of a business must be in the country in which a part at least of its capital was subscribed, as to the sufficiency of which the courts shall decide. "A necessary connection," he says, "exists between these different things, nationality, the domicile of the company, centre of administrative business, the law to be observed and country of subscription<sup>1</sup>," and again "the shareholder ought to have his representatives on the direction in his own country; the general meeting to which he is summoned ought to be held

<sup>1</sup> Thaller, p. 257; cp. Surville and Arthuys, § 456; Pineau, p. 143.

in the same country. He cannot be marched off a thousand leagues from there—in order to take part in deliberations sanctioned by a law with the effect of which he is unfamiliar,—it is therefore in his territorial location that there must be placed, if not the only centre of administrative business, at least one such centre<sup>1</sup>.” It has also been suggested by M. Lebel that the centre of administrative business must be placed in the country in which the majority of its members are domiciled<sup>2</sup>. There is no doubt great force in what M. Thaller says as to the convenience of subscribers: but these are practical rather than juridical considerations, and may safely be left to work themselves out in practice. Considerations such as those which he suggests will lead founders in practice to fix the centre of administrative business in the country from which they derive their capital: if they do not do so, and investors, knowing this, or failing to safeguard themselves in the matter, yet become subscribers to the juristic person, then they have nothing to complain of in a state of affairs to which they must be considered to have agreed. From the theoretical point of view it has already been pointed out that such theories as these amount in substance to a rejection of domicile as a test of nationality in favour of some totally different test. It is not intended apparently that a juristic person should be prohibited from fixing its centre of administrative business elsewhere than in the given place, in the sense that it is unlawful or penal for it to do so: but only that, if it is so fixed, it is to be neglected in determining the nationality of the juristic person, which must then, unless the juristic person is to be treated as an outcast without nationality, be referred to some other test, presumably to that of the place in which the centre ought to have been fixed. The theories, therefore, of M. Thaller and M. Lebel are respectively identical in substance with the theories that a juristic person is domestic in the country in which it performed all or one of its constituting acts, or in which the majority of its members are domestic: and they are open in consequence to all the objections to those theories which have been dealt with already.

<sup>1</sup> Thaller, *op. cit.*, p. 257.

<sup>2</sup> Lebel, *Cong. Soc. par Act* 1900; *Comptes Rendus*, p. 368. It may be observed that according to Roumanian law a company is Roumanian which was constituted and has its centre of administrative business in Roumania. Cp. *Les Sociétés Étrangères en Roumanie*. Negulesco, Clunet (1910), p. 57.

15. It is very commonly argued that it is necessary to limit freedom of choice according to the formula that a juristic person is domestic in the country in which the centre of its administrative business is situated "in good faith" or "without fraud<sup>1</sup>."

The word fraud in this connection is capable of two meanings. Construed in one way it expresses a valid limitation, but one so obvious that it would seem unnecessary to make express mention of it. Construed in the other, it amounts to the statement of a theory, like in kind to some which have already been considered, and open to the same objections. Fraud may mean a mere fraudulent simulation of a centre of business in a place other than the true centre; and then its effect is only to call attention to a matter which scarcely needs so much emphasis, that the situation of the centre of a juristic person's administrative business is a question of fact: that that place which is in fact its true centre is its domicile, and that if it pretends to have its centre at some other place than that at which it is in fact, such pretended centre is to be disregarded as a test of nationality in favour of its true centre<sup>2</sup>. But it is clear that this is not the meaning which the word is commonly intended to bear. By fraud is meant here, not the simulation of a false centre of administrative business, but a fraud practised upon the law in fixing the situation of the true centre, a fraud which consists in fixing that true centre in some country in which it ought not to be. Thus it has been frequently held in practice that a juristic person cannot be recognised to be foreign which fixes its centre of administrative business abroad for the sole purpose of evading the provisions of the law of the country in which that centre ought to have been fixed<sup>3</sup>. In the United States the same doctrine has been applied to the accepted theory that a corporation is domestic in the country by the laws of which it was

<sup>1</sup> Cp. Resolution of Institute of International Law, 1891, No. 5, quoted p. 327, note 1.

<sup>2</sup> Cp. judgment of *Trib. Comm. Seine* of 3rd May, 1899, Clunet, 1900, p. 802.

<sup>3</sup> Cp. Thaller, *Revue Critique*, 1883, p. 340, and *Annales de droit commercial*, 1889, 2nd part, p. 17; Pic, p. 584; Sacopoulo, p. 173; Pineau, p. 153; Pillet, p. 201; and judgments of Swiss Federal Council of 21st January, 1875, Clunet, 1875, p. 80; *Trib. Comm. Seine*, Judgment of 26th August, 1902, Clunet, 1904, p. 189; *Cour Cass.* Judgment of 27th March, 1898, Sirey, 1901, I., p. 70.

created. Thus it has been held that for the citizens of one state to organise a corporation under the laws of another for the purpose of transacting all its business in the former is a fraud upon the laws of the former state, and that the corporation possesses in consequence no personal status within its territories<sup>1</sup>.

It is apparent that when this meaning is given to the word, some other test than that of domicile is being introduced as the true and ultimate test of nationality. It is assumed that while the domicile fixed by a juristic person in a certain country may be the actual centre of its administrative business, yet it is to be disregarded in determining the juristic person's nationality, because it is not in the country in which it ought to be. The introduction of the idea that there is an obligation to fix the centre of administrative business in some country and that not to fix it there is a fraud, shows that not the country in which the domicile is, but that other country in which it ought to be, is in reality being assumed as the country in which the juristic person is domestic. The introduction of some such further test of nationality is necessary to give any meaning to the word fraud. It means an intentional disregard of some binding law. But if the centre of administrative business is the simple and sufficient test of nationality, then the law of juristic persons of any state binds those juristic persons only which have their centre of administrative business within its territories. It does not bind those which fix their centre of administrative business elsewhere, and if it does not bind them it is no fraud for them to disregard it<sup>2</sup>. Under these circumstances an inherent defect of the word fraud is that it does not tell us in what country the centre of administrative business ought to be placed. To say that it must be placed somewhere in good faith refers us to some standard as to what is and what is not fraudulent, but gives no clue as to what the standard is. Is it fraudulent to place the centre of administrative business elsewhere than in the country

<sup>1</sup> Hill v. Beach, 12 N.J. Eq., p. 31; Booth v. Wonderly (1873), 36 N.J.L., p. 250; Merrick v. Van Santvoord (1866), 34 N.Y., p. 208, *sed contra* Demarest v. Flack (1891), 128 N.Y., p. 205.

<sup>2</sup> Cp. Mamelok, p. 229; Arminjon, p. 408; Diena, p. 260; Demarest v. Flack (*sup.*).



in which the juristic person was authorised? or in which the majority of its members reside, or the greater part of its capital is owned? or in which one or all of the acts necessary for its constitution were performed? or in which the scene of its operations is situated? If we accept one or other of these circumstances as the standard of fraud, it is clear that we are in substance abandoning the centre of administrative business as a test of nationality in favour of another test, and thus incurring all those difficulties which have been seen to attend the adoption of any of those other tests. Perhaps the use of the word fraud is most commonly intended to imply that all such circumstances are to be weighed in considering whether a juristic person has fixed its centre of administrative business in good faith or not, so that the issue of fraud or no fraud depends upon a comprehensive view of all the circumstances of the juristic person. If this is so, then centre of administrative business is being rejected as a test of nationality in favour of an eclectic system which makes nationality depend on the resultant of all those circumstances the claims of which to be the sole test have already been considered one by one.

16. This principle, that the nationality of a juristic person is what is called a simple question of fact, dependent upon its circumstances, has been sometimes advocated independently<sup>1</sup>, apart from its implication in the limitation against fraud usually added to formulae adopting the centre of administrative business as the sole test of nationality. It may be said of it that in attempting to combine all other proposed principles, it succeeds in combining their defects only. Nationality is not in any accurate sense a question of fact. It is a question of a legal inference to be made from facts, and what facts may give rise to that inference must be ascertained by some definite legal principle. The eclectic system provides no such principle. It negatives the possibility of arriving at any definite conclusion to the discussion and erects that negation into a principle. Referred to this standard, courts of law would be left without any definite guidance for their decisions. Different

<sup>1</sup> Cp. Macquero, *Traité Alphabétique des droits de l'enregistrement*; Rolin, vol. III., § 1278; *Cour Cass.* Judgment of 20th June, 1870, Dalloz, 1870, I., p. 416; Surville and Arthuys, § 456; Vavasseur, p. 349, who inclines, however, to the acceptance of centre of administrative business as the sole test.

courts might consider that different circumstances were material to their decisions, or that the same circumstances were of different importance, and certainty and uniformity of decision would be imperilled.

For these reasons, it seems that to introduce a qualification as to fraud into the statement that a juristic person is domiciled at its centre of administrative business is in fact to qualify away the whole effect of the statement<sup>1</sup>. The principle is sufficient in itself: and it is most satisfactory and acceptable in its absolute and literal meaning. The presence of the centre of administrative business of a juristic person in a certain country establishes a relation between the juristic person and the local law of juristic persons which makes it domestic in that country, and makes that law its personal law<sup>2</sup>. The centre of administrative business must of course be the true centre and not a simulated centre: but this reservation needs no expression by the use of the word fraud or otherwise, for a simulated centre is not a centre at all. But apart from this, there does not appear to be any substantial reason from the practical point of view why any limitation should be put upon the theory, or for the reluctance which has been exhibited by the courts of several countries to recognise that a juristic person is foreign when the scene of its operations is within the domestic territories while its true centre of administrative business is abroad. It must be remembered that a discharge by the juristic person of its functions, an exercise by it of functional capacity, will in any event be subject to the local laws. It should be recognised that a juristic person by fixing its seat in a country has in that circumstance which is of the most relevance and importance become domestic there: that it has not avoided the imposition of the law of any other country by a mere formality or by a trick, but that in substance and in fact it has never been bound by that law and that other countries are not entitled to disregard the substantial connection which it has formed with the country in which its centre of administrative business is situated. If they disapprove of the juristic person, the appropriate remedy is to refuse it functional capacity. To deny its essentially foreign character,

<sup>1</sup> Cp. Arminjon, p. 408 et seq.

<sup>2</sup> Cp. judgment of Swiss Federal Council of 21st Jan., 1875, *Clunet*, 1875, p. 80.

and to assert that it is domestic, is to deny that it possesses a characteristic which it does possess, and to assert that it possesses one which it does not, and thus to substitute a legal fiction for a fact.

17. The principle that a juristic person is domestic in the state in which it is domiciled is commonly stated by continental jurists to be true only of those juristic persons which have received no express authorisation or recognition from any state, a class which includes the great majority of commercial associations. As has been seen, it is considered that juristic persons which have obtained express authorisation, a class which is usually assumed to be and which is in practice identical with that of juristic persons which discharge public functions, are by that circumstance conclusively proved to be domestic in the territories of the state by which they were authorised. Such a division of juristic persons into two classes is natural for those who are primarily concerned with legal systems in which there is a sharp distinction in status between the private and the public juristic person. It is less natural for common lawyers who are not accustomed to make the distinction. Nor does the distinction appear to be necessary in this connection. Something has already been said of the defects in the principle that authorisation fixes nationality. It makes nationality depend on external and political circumstances, and not on the intrinsic legal character and circumstances of the juristic person. The fact that a juristic person discharges functions which are part of the proper activities of the state, and can therefore be discharged by the juristic person only by means of a delegation of authority from the state, shows no doubt that the juristic person is from the political point of view acting as part of the state's organisation. But why should this be conclusive from the juridical point of view of its nationality? It is not so in the case of natural persons. A tax collector has not necessarily English law as his personal law because he collects taxes on behalf of the Inland Revenue; his personal law depends upon his domicile and his occupation is without effect upon the matter. So also the functions of a juristic person are unconnected with and should have no effect upon the question of its personal law. The non-essential nature of functional capacity

Proposed  
limitation  
of theory of  
natural  
domicile to  
juristic  
persons  
without  
express  
authorisation.

as a test of nationality may be illustrated by considering the case of a religious or philanthropic institution which discharges its functions in several countries. Certain missionary societies for instance carry on their propaganda all over the world, in both civilised and barbarous countries, exercising in each educational and other functions of a public nature. If nationality is to be determined by the nature of the functions performed, each of such societies has a different nationality in every state in which it operates, and is not one society but many. Common sense and common opinion however cling to the opinion that each is but one society, domestic in the country in which its administrative business is transacted.

No doubt juristic persons exercising public functions will, with but few exceptions, have their centre of administrative business within the territories of the state in connection with which they discharge their functions. The majority of them, such as public administrative bodies, municipalities, colleges, hospitals, and churches, are by nature fixed to one particular spot, both as the scene of their operations and as the centre of their administrative business: nor is it easy to imagine circumstances in which a state is likely to grant express authorisation to a juristic person whose centre of administrative business is fixed outside its territories. There is therefore little practical difference between the acceptance of centre of administrative business as the test of nationality in every case, and the acceptance of it as a test only when there has been no express authorisation. But theoretically the former theory seems preferable. If centre of administrative business is the true test as to any juristic person, there is no such specific difference between juristic persons of different sorts as to prevent its being equally applicable to every sort, and to accept it for some while rejecting it for others seems purely arbitrary. The principle that a juristic person is domestic in the country in which its centre of administrative business is situated is based upon the idea that it is at that place that it manifests its personality: and that is true whatever may be the functions which it performs, and whether it is a commercial association, or a corporation with public functions, or a *fondation* or *Stiftung* without members, acting by a committee of management.

*Applications of the principle that a juristic person is domestic in the country in which its centre of administrative business is situated.*

18. If a juristic person is domestic in the country in which its centre of business is situated, and has the law of that country for its personal law, then we know that its constitution, capacities and manner of performing its functions, its relation to its members, the relations of the members to each other, and all other matters which on general principles are matters for the personal law, must be regulated by the law of juristic persons of that country. Combining this principle with the principle that as regards the public formalities attendant upon its constitution, *Locus regit actum*, we may say that we have a complete account of its position in private international law. An artificial case may be imagined which exhibits the relative sphere of application of each principle. Suppose for instance that a commercial association is registered in France to carry on some business in Morocco and that by the constituting document the centre of its administrative business is fixed for convenience sake at Madrid, and that its administrative business is actually conducted there. The company is then a Spanish company. Its personal law is the Spanish law relating to joint stock companies of the same type, and it must observe the provisions of that law. But its registration and the other formalities which attended its constitution are governed by the law of the place at which they were performed. To these, therefore, the French law must be applied. To the legal relations which it contracts in Morocco the Moroccan law of juristic persons, such as it is, will apply, in so far as that law contains applicable provisions which relate to public order and the interests of third parties, subjects of the state of Morocco. Lastly, the reservation must be made, that the members of the juristic person may, as between themselves only, and within certain limitations, alter the situation by agreement. Positive prohibitions or commands enacted in the interest of third parties which form part of some body of law applicable to them cannot be affected by private agreement. But legal relations which concern themselves alone and are not subject to any such prohibition or command they may agree to subject to any law

Application of theory placing natural domicile at the centre of administrative business.

they please. If such an intention is expressed or may be implied from the constituting contract of the juristic person, it is binding on the parties thereto. They may, for instance, agree to submit questions about the construction of their contract to the laws and the jurisdiction of the courts of any country. But such an agreement can have no effect upon third parties, strangers to that contract<sup>1</sup>. Apart from any intention expressed or necessarily implied to submit the incidents of the constituting contract, or any one of them, to some particular law, there is clearly the strongest possible presumption that the law intended by the contracting parties to govern those incidents was the law of the country in which the juristic person was to have its permanent home and in which it was to be domestic. In the absence of provisions to the contrary, in fact, express or implied, the members must naturally be presumed to have adopted for the juristic person as between themselves the same law that will be its personal law in relation to third parties and that they did not intend unnecessarily to confuse matters by introducing a double set of rules of law by which to regulate their affairs: any other presumption would be arbitrary, and in conflict with fact<sup>2</sup>.

19. Such is the account of the legal position of a foreign juristic person which must be given according to this theory; and it is an adequate account of juristic persons other than joint stock commercial associations. In their case there are difficulties in practice which tend to obscure its application. Legislatures have been accustomed to contemplate the constitution and regulation of those joint stock companies only which are and are to remain domestic in their territories. In their legislation they have thought of and provided for one sort of company only, that which performs the formalities of constitution within their own territories and places and retains the centre of its administrative business there. They have not contemplated the case of companies which might fix the centre of administrative business in some country other than that in which they were constituted, or might change that centre from one country to another. This

Practical difficulties caused by inseparability of legislative provisions as to substance and as to form.

<sup>1</sup> Cp. Diena, p. 319, § 46.

<sup>2</sup> So Diena, p. 320; Von Bar, § 291; and Brocher, p. 229; *contra* Fiore, vol. II., §§ 849, 856, who says that their intention must have been to refer their legal relations to the law of the country in which the juristic person was first constituted.

attitude has had a consequence of importance to foreign companies. No sharp distinction has been made in such legislation between the three parts of the law of juristic persons, that relating to the formalities of institution, that relating to the internal constitution of the company, and that relating to its dealings with members of the public. The confusion of these three parts must interpose great practical difficulties in the way of a company which desires to perform the acts attendant upon its constitution in one country, and yet to fix its centre of administrative business and be domestic in another, or which desires to change the centre of its administrative business from one country to another. It may not be able to perform the formalities of constitution in the former country without at the same time conforming to provisions relating to its permanent internal constitution and manner of functioning which are totally inconsistent with the provisions regulating the same matters which are in force in the country in which it fixes its centre of administrative business, and which should be looked upon as its personal law<sup>1</sup>. We may consider, for instance, a joint stock company which is registered in Germany and fixes its centre of administrative business in England. English law knows only one sort of registered joint stock limited company, that which is constituted in accordance with the Companies Consolidation Act, 1908. The provisions of those acts relating to the constitution and functioning of the company must therefore be the company's personal law. But there are two difficulties in its way. In the first place owing to the interdependence of provisions of substance and provisions of form in the English company act, the provisions of substance contained in that act cannot be applied to the company until it has complied with its provisions of form, *i.e.* unless it has been registered under the act. In the second place, owing to the interdependence of provisions of substance and provisions of form in the German company acts, the company has been obliged, in order to obtain registration in Germany, to adopt a constitution and manner of functioning which is quite irreconcilable with the constitution and manner of functioning for which English Law, which will be its true personal law, provides. Thus, for instance, the primary agents

<sup>1</sup> Cp. judgment of the French Consular Court at Constantinople, of September 1899, *Clunet*, 1900, p. 657.

of the joint stock companies for the registration of which German law provides have general and unlimited powers; German law knows of no doctrine of *ultra vires* to invalidate their contracts<sup>1</sup>; and this is an element in the constitution of the company which must be a term of the contract between its members by which it is constituted. English law, on the other hand, knows a doctrine of *ultra vires* by which the powers of the directors are limited to the purposes for which a company is constituted. A company registered under the German law would therefore be incapable of assuming English law as its personal law. To do so it would have to effect an alteration in the contract which is the basis of its existence. Owing to the interdependence of the three parts of the law of juristic persons in the laws both of the country in which the company performed the formalities attendant upon its constitution, and of the country in which it fixes its centre of administrative business, it must in general be impossible for a foreign company which has performed the formalities attendant upon its constitution in one country to fix its centre of administrative business in another, and a decision that it is subject to the provisions of the law of the latter country as its personal law, must in general be its death-blow, either because it is by nature incapable of conforming to the provisions of that law or because it has not in fact conformed to its provisions. A peg cast in a round mould cannot be fitted into a square hole. It will be observed, however, that such difficulties are of a practical nature only. They are caused by the fact that legislatures have not been in the habit of considering the position of foreign juristic persons when legislating for juristic persons in general, and that they have not acted upon any general principle as to the nationality of juristic persons. Had they acted upon such a principle and recognised that only a juristic person whose centre of administrative business is situated within the territories of a state should be treated as domestic in that state, and that other juristic persons should be treated as foreign, they would no doubt have recognised also that provisions of law regulating the constitution and capacities of juristic persons and the relations of their members *inter se* should be applied to those juristic persons only which were in that sense domestic: but that provisions of law regulating the formalities attendant upon the constitution

<sup>1</sup> *H.G.B.*, 59, 60.



of a juristic person, and those for the protection of the interests of members of the public, subjects of the state, should be applied to all juristic persons, domestic and foreign alike. They would then have seen the necessity of making a clear distinction between the three portions, enforcing the latter upon those juristic persons only whose centre of administrative business was within their own territories. Their failure to do so tends to obscure the principle that a juristic person is domestic in the country in which its centre of administrative business is situated, and to put practical difficulties in the way of its application : but it does not affect its validity. Under the circumstances, its application to questions involving the constitution or capacities of joint stock associations which fix the centre of administrative business in a country other than that in which they performed the formalities attendant upon their constitution must usually result in the conclusion that the joint stock association has tried to achieve the impossible, and that it has destroyed itself in the act, so that it must be dealt with as a mere collection of individuals or partnership. There are, however, no such difficulties in the way of other juristic persons which are not compelled to adopt any particular form of constitution as a condition of being allowed to perform the formalities attendant upon their constitution in a country, and which are not prevented by the provisions of the law which should be their personal law from becoming subject to it until they have performed the formalities of constitution which it demands. There appears for instance to be no reason why a literary association which fixes its centre of administrative business in England and is therefore English should not claim to be a corporation in virtue of formalities performed by it in one of the United States, which would be sufficient to confer juristic personality upon it according to the law of that state. To deny it would be to deny that the principle *locus regit actum* possesses any validity at all.

These considerations throw some light upon a question which has been the subject of much controversy, whether a juristic person can change its nationality. Put in this form, the question has no real meaning. A juristic person which has changed its nationality has changed its personal law, and it can scarcely be considered to preserve its identity through so vital a transformation. The question to be asked is rather, what is the

effect upon a juristic person of a change in that circumstance which is accepted as the test of nationality, so that, whereas it formerly connected the juristic person with one state, it now appears to connect it with another. Those who maintain that a juristic person is domestic in the country in which the scene of its operations is situated, will maintain also that a change of its centre of administrative business from one country to another has no effect upon its nationality, but that if its scene of operations be shifted to a new country, it loses its original nationality, even if it does not gain a fresh one<sup>1</sup>.

If centre of administrative business be accepted as the sole test of nationality, it is to a change of that centre that such a result must be attributed. If it be transferred from the country in which it was originally situated to another, the juristic person must cease to be domestic in the former country. But it does not follow that it becomes domestic in the latter. In the first place, if it be a joint stock company, it is prevented from doing so by all those difficulties which have just been considered as affecting it if it seeks to fix its centre of administrative business, in the first place, in some country other than that in which it performed the formalities attendant upon its constitution<sup>2</sup>. Secondly, it must often be the case either that the centre of administrative business is expressly fixed in a particular place by the constituting documents of the juristic person, or that it must be implied from them that it is so fixed. Its situation then is a term of the contract upon which the juristic person is based, and which cannot be altered. The parties to the contract may of course agree to alter it in this respect, and to make a new contract; but they would then be making a new juristic person also. Under the circumstances then it would seem that the only way in which a juristic person can acquire a new nationality is by annexation to another state<sup>3</sup> of the territories in which its centre of administrative business is placed.

<sup>1</sup> Vavasseur, p. 350; cp. also Vincent and Pénaud, *tit. Société*, 14; MM. Lyon-Caen and Renault, compromising between scene of operations and centre of administrative business, maintain that a change of one is without effect, but that a change of both deprives a juristic person of its original nationality, No. 1168.

<sup>2</sup> Cp. Judgment of Berlin Kammergericht of 5th June, 1882, Clunet, 1883, p. 315.

<sup>3</sup> It has been decided that a French company established in Alsace-Lorraine before 1870 which maintained its centre of administrative business there after the

Cases may however occur in which the difficulties are removed. It is in general only joint stock companies which are compelled by legislation to adopt a particular form of constitution: other juristic persons, including both non-commercial corporations and commercial associations without a joint stock, such as *sociétés en nom collectif*, are for the most part free to design their constitutions for themselves: and there is much similarity between the type of constitution usually adopted by the latter class, at least, in the various countries in which it is known. The constitution of some charitable corporation for instance or of some *société en nom collectif* might well be equally well suited to exist and operate under the laws of several states. If in addition to this the situation of the centre of its administrative business were not fixed expressly or implicitly by the constituting documents of the juristic person, there seems to be no reason why it should not transfer its centre of administrative business from one country to another, or why it should not thereby become domestic in the latter country. From one point of view, no doubt, having changed one of its most important qualities, it is to that extent no longer identically the same juristic person. But from the more practical point of view it does preserve its identity.

20. Those, indeed, who adhere strictly to the theory that the personality of a juristic person is pure fiction, must maintain as a consequence of that theory that it is impossible for a juristic person to possess any nationality but that of the state by the law of which it is feigned. According to them, a juristic person is a creature of law and exists only in contemplation of the law which created it, and clearly the same juristic person cannot be contemplated by two laws at once. If it seeks to pass from the contemplation of one law to that of another it must obtain some express authorisation or recognition in the second state, which is in reality nothing less than a re-creation. In consequence, if it loses its original nationality by transferring its centre of administrative business from one country to another, it must be re-created in the latter country by obtaining a so-called recognition, or by performing there the formalities necessary according to the local law for the formation of juristic persons of

Theory that natural domicile decides nationality irreconcilable with fiction theory.

annexation became thereby a foreign company. Judgment of *Trib. Civ. Seine* of 13th April, 1877, *Clunet*, 1878, p. 160.

a similar type. If it does not do so, the transfer of its centre of administrative business results in its destruction, so that it must be dealt with as a mere collection of natural persons<sup>1</sup>. If on the other hand such reasoning as this, deduced *a priori* from a technical theory, be rejected in favour of the theory that there is at least an element of reality in the personality of a juristic person, the difficulties supposed to prevent it from changing its nationality disappear. It may then be considered that a transfer of its centre of administrative business from one country to another has an effect upon it analogous to that which a transfer of domicile has upon a natural person. It ceases to be domestic in the former country, and to be regulated by its laws as its personal law. It becomes domestic in the latter and is thenceforward regulated by the law of that country as its personal law. The real elements in its personality survive the transfer just as the real personality of a natural person does.

21. The actual character and practical circumstances of modern juristic persons tend to increase the importance of natural domicile amongst their legal characteristics, and to diminish that of the process by which they came into existence. Men tend more and more to see in juristic persons, not legal fictions, but real things; and if there is any reality in juristic personality, there can be no difficulty in admitting that the situation of its domicile can and should have the same effect upon its life in the law that his domicile has upon that of a natural person.

<sup>1</sup> "A juristic person cannot change its personal statute because it is the fictitious creation of a given legislature. If it breaks the bond which attaches it to the place which gave it birth it becomes nothing. It must be re-created to exist abroad"; Pineau, p. 158; cp. Von Bar, § 47; Weiss, p. 418; Mamelok, p. 233; and judgment of *Cour Cass, Brux.* of 14th October, 1870, Pasicrasie, 1870, vol. II., p. 43.

## PART II

### FOREIGN COMPANIES AND OTHER CORPORATIONS IN ENGLISH LAW

## CHAPTER V

### GENERAL PRINCIPLES

I. THE preceding pages dealt with theories of jurisprudence more or less abstract in nature. When we turn to the positive law of England we are no longer concerned to argue theories, but only to state facts. It is not in the nature of the Common Law to establish one abstract theory as orthodox, or to condemn another as heterodox. The law of England, contained as it is in statutes enacted to meet practical needs, and in particular decisions of practical cases, tells us what practical action is legal in certain given circumstances. Seldom or never does it give us as positive law an abstract principle of jurisprudence. The courts act indeed upon such principles, and base their decisions upon them. But it is the rule that a certain course of action is to be adopted in certain circumstances that is positive law: not the principle from which that rule is deduced. Except in rare instances in which the principle is confirmed by a statute there is and can be no authority for the general principle as distinguished from the practice in particular cases. It may be a necessary inference from the application of the rule that the court has accepted and acted upon the principle. But lawyers are left to draw that inference unsupported except by their own reasoning faculties. To extract the principle of English Law about foreign corporations from the decided cases presents this additional difficulty, that the cases have for the most part been decided without much regard to those theories as to status, capacities, and domicile which are dealt with in the preceding pages. We may guess that if circumstances had forced the

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rule

matter upon their attention, English courts would have adopted the American reasoning on the subject, or that they would have worked out independently a similar system, with its theories that a corporation cannot reside except in the jurisdiction of the state which created it, and of an implied recognition granted to it by comity abroad. But as it is, there is no authority in our law for one or other of those theories or for any other theory about the matter, and save for two brief allusions, *obiter dicta*, we may search in vain amongst reported cases for guidance in the matter. On the other hand, the attitude of the courts towards foreign corporations has varied little. We are not much troubled with conflicting decisions. Foreign juristic persons in this country have always met with the same liberal treatment: and simple and necessary inferences from decided cases enable us to state the following general principles.

*Foreign corporations have status as persons in England and the law of England takes notice of them.*

2. This follows from the earliest reported decision concerning a foreign corporation, *Henriques v. General Privileged Dutch Co.*<sup>1</sup>, which is of importance as the leading case upon the subject, by which the whole course of the subsequent development of English law about this matter has been affected. The Dutch West India Company sued in the King's Bench for money borrowed by the defendant at Amsterdam. At the trial *in nisi prius* they were made to give in evidence the instruments whereby, by the law of Holland, they were effectually created a corporation there: and had judgment, the jury finding that the plaintiffs were the company who had lent the money. It was reserved for discussion (1) whether the articles of debt in question could be sued in England, (2) whether this was a good name for the Company to sue by; but on a motion to set aside the verdict in the Common Pleas the court were all of opinion for the Company on both points. On error this judgment was affirmed in the King's Bench and in Parliament. The judgments are not reported at length, but before Parliament it was argued against the Company that the law of England does not take notice of any foreign corporation, and that a foreign corporation cannot in their corporate name and capacity maintain

<sup>1</sup> 2 Raymond, 1532.

an action at Common Law in this kingdom; and the decision is therefore an authority for the negative of these propositions. It was thus decided, apparently without hesitation, that a foreign corporation can appear in its corporate character before the English courts and be regarded as a person by the laws of England. The same principle must also necessarily be inferred from the particular capacities of which it is possessed according to English law and which are dealt with in detail below.

If additional evidence be needed that foreign corporations have status as persons in England, it may be found in the fact that conventions have been made by this country with France, Belgium, Italy, Germany, Spain, Greece, Tunis, Austria and Russia, for the mutual admission of commercial associations to civil rights and that no legislation has been found necessary to provide for their fulfilment here.

Legal personality is nothing other than the capacity of being a subject of rights. Foreign corporations which are possessed of status as persons in the contemplation of English Law, are therefore capable of being the subject of rights in English Law, whether they are rights based on contract, rights of property, or rights derived immediately from their status as persons. Their bond, for instance, is accepted as security for costs, a striking recognition of the validity of the contractual obligations incurred by them in this country<sup>1</sup>. Amongst other rights of property they can enjoy patent rights<sup>2</sup>; and as persons they are entitled to protect their trade mark and trade name<sup>3</sup>. It is a matter of daily experience that foreign corporations can enter into contracts and acquire and dispose of property in this country. That they are capable of doing so is implied in every subsequent principle stated in this section and needs no further authority.

The condition of our law in this respect is consistent with the American theory as to the position of a foreign corporation. It is also consistent with that theory as to their position which has been described as the liberal system, which bases their claim to personal status on their close resemblance to natural persons in the eyes of the law. The decisions of our courts commit us however to neither theory. But there are indications in the reports that,

<sup>1</sup> *Aldrich v. British Griffin & Co.* (1904), 2 K.B., p. 850 (C. A.).

<sup>2</sup> *Post*, p. 294.

<sup>3</sup> *Post*, p. 295.

as might be expected, the American doctrine, which has grown out of the common law, would probably have been accepted, until lately at any rate, as good law by most English judges. Story's statement of the doctrine of comity<sup>1</sup> that "in the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests<sup>2</sup>," has been referred to with approval by the Privy Council in speaking of the status of a foreign juridical person<sup>3</sup>. Lately it has been said that "the corporate existence of foreign corporations is only recognised in other countries by international comity<sup>4</sup>." Professor Dicey appears to adopt the same point of view, in referring the right of a foreign juridical person to enjoy its personal law to the principle that "any right which has been duly acquired under the law of any civilised country is recognised and in general enforced by English courts<sup>5</sup>." Mr Foote adopts the American doctrine as the law of England, adding, in spite of *Henriques v. General Privileged Dutch Co.*, that the courts of all countries are open *prima facie* to natural persons and no others<sup>6</sup>; and Mr Seward Brice says that the views held in the United States are probably substantially the same as those held in this country<sup>7</sup>. There is, however, little authority for these assumptions, and in special contrast to Mr Foote, we have the authority of Professor Westlake that in private international law "in dealings with others (an artificial person) stands on the footing of natural persons domiciled abroad<sup>8</sup>." An observation in the Court of Appeal shows that it is still open to an English lawyer to contend that comity is no adequate basis upon which to found a foreign corporation's claim to personal status. The American cases, it has been said by Lord Collins, then Master of the Rolls, "say that a corporation can have only one domicile or residence, but may carry on business in a foreign country, which possibility

<sup>1</sup> See p. 48.

<sup>2</sup> Story, *C.L.*, 2nd ed., sec. 38.

<sup>3</sup> *Bateman v. Service* (1881), 6 H.L. p. 386.

<sup>4</sup> *De Beers Consolidated Mines Ltd. v. Howe* (1905), 2 K.B. at p. 630 (per Phillimore J.).

<sup>5</sup> Dicey, Rule 126 and General Principle 1.

<sup>6</sup> Foote, *P.I.L.*, 3rd edit., p. 126.

<sup>7</sup> Brice, *Ultra Vires*, 3rd edit., p. 6.

<sup>8</sup> Westlake, p. 358.



they derive from the comity of nations. Whether it rests on comity or on the view that a corporation being an entity that entity is legally capable of existing within a jurisdiction other than that of the country which gave it birth, the result is that it can carry on business in a country other than that in which it was incorporated<sup>1</sup>." In view of this dictum it is at least permissible to argue that a foreign corporation possesses status and capacity here on the ground that, for these purposes, it is indistinguishable from a natural person.

*A foreign corporation can sue and otherwise initiate legal proceedings in English courts.*

3. This was decided, as has been seen, in *Henriques v. General Privileged Dutch Co.* (*sup.*). The proposition scarcely needs further authority, but *Henriques v. General Privileged Dutch Co.* was expressly affirmed on this point in *The National Bank of St Charles v. De Bernales*<sup>2</sup>. The plaintiffs were a Spanish bank, and it was held by Abbot C.J. that a corporation in a foreign country may sue as such in the courts of this country. After this case it was never again suggested that English courts would not recognise a foreign corporation or its power to sue, and in 1828 we find an American bank securing a verdict on an issue against a bankrupt without any objection being made to its status<sup>3</sup>. It is common knowledge that now foreign corporations both can and do frequently initiate litigation in English courts, with no less freedom than English corporations. They are, however, under the same obligations as foreign natural persons. They must give security for costs under certain circumstances. Thus an Irish company was compelled to give security for costs in spite of an affidavit that it had funds in a London bank, and that many of its members were resident in England<sup>4</sup>; and a Scotch company was ordered to give security for costs, on the ground that it would have been exempted from the necessity only if it had had "sure" property, not necessarily realty, within the jurisdiction<sup>5</sup>. And

<sup>1</sup> *De Beers Consolidated Mines Ltd. v. Howe* (1905), 2 K.B. at p. 635.

<sup>2</sup> (1825) 1 C. & P. p. 569.

<sup>3</sup> *President, Directors and Company of the Bank of the State of S. Carolina in the U.S.A. v. Case and others* (1828), 8 B. & C. 427.

<sup>4</sup> *Limerick and Waterford Railway Co. v. Fraser* (1827), 4 Bing., p. 394.

<sup>5</sup> *Edinburgh and Leith Railway Co. v. Dawson* (1839), 1 Dowl., p. 573.

in *The Kilkenny and Great S. and W. Railway Company v. Fielder*<sup>1</sup> proceedings were stayed in an action brought by an Irish company until it should give security. "Persons out of the jurisdiction," said Pollock C.B., "whether individuals or corporations suing in the courts here must give security for costs unless they have real property in this country, or at least property of a permanent nature, for personal property is insufficient."

*A foreign corporation can be sued and be made otherwise answerable in legal proceedings in English courts.*

4. The first case in which a foreign corporation appeared as defendant to an action at law was *Newby v. Von Oppen and The Colts' Patent Firearms Manufacturing Company*<sup>2</sup>; which is the principal authority for the above proposition.

This was a motion to set aside service of a writ upon the second defendant, which was an American company. It was argued that a foreign corporation is not suable.<sup>X</sup> But the court declined to prevent the plaintiff from proceeding on those grounds, pointing out that if the corporation is not suable there is no remedy, because it had been held in *General Steam Navigation Company v. Guillou* that ~~the members of a foreign corporation are not suable personally~~<sup>3</sup>, and it was said that their capacity to be sued seems to follow from their being permitted to sue as plaintiffs. The court also relied upon the fact that in *The Carron Iron Company Proprietors v. MacLaren*<sup>4</sup> no objection was raised by the court or otherwise to proceedings against a Scottish corporation on the grounds that a Court of Equity could not treat a foreign corporation as defendant, or exercise over it its jurisdiction *in personam*<sup>5</sup>. The authority of this case has not since been questioned, and foreign corporations are now as often defendants in proceedings in English courts as they are plaintiffs.

*A foreign corporation which itself carries on business here at a place of business is subject to the jurisdiction of the court in personam.*

5. This principle rests ultimately on the authority of the judgment of Lord St Leonards in *Carron Iron Co. v. MacLaren*<sup>6</sup>,

<sup>1</sup> (1851) 6 Ex. 81 at p. 84.

<sup>2</sup> (1872) L.R. 7 Q.B. 293.

<sup>3</sup> 11 M. & W. 877.

<sup>4</sup> (1855) 5 H.L.C. p. 416.

<sup>5</sup> Judgment of Court per Blackburne J. at p. 294.

<sup>6</sup> (1855) 5 H.L.C., p. 416.

dealt with at length hereafter. It is confirmed by a dictum in the case of *Duder v. Amsterdamsch Trustees Kantoor*<sup>1</sup>. In that case a motion was made to enforce a prior equitable charge made in England on property in Brazil. The defendant was a Dutch corporation. It was said by Byrne J.<sup>2</sup> that: "If the defendants are resident in England, no doubt the plaintiffs are entitled to enforce the charge against them."

*A foreign corporation like a foreign natural person is subject to the lex fori in matters of procedure in our courts.*

6. It is scarcely necessary to cite an authority for this proposition, which is a matter of common knowledge and frequent experience. In *Barber v. Mexican Land and Colonization Co. Ltd.*<sup>3</sup>, it was held that an American court had no power to authorise an individual to bring an action in an English court in the name of an American company, since no foreign court can alter the procedure or practice of the English court.

*A foreign corporation can perform its functions here without restrictions or the necessity for previous authorisation, except as expressly limited by statute.*

7. The statutes in question are the Assurance Companies Act, 1909, and the Companies (Consolidation) Act, 1908, § 274, which are dealt with in detail below. Apart from their provisions, there are not and never have been any restrictions on the power of foreign companies to carry on business here, or on that of other types of foreign corporations to discharge their corporate functions here. The courts might have come to the conclusion that public policy demanded that the operations of all foreign corporations or of some particular sort of foreign corporation, such as religious communities, should be prohibited. But no general hostility towards them has ever been displayed either by the courts or by the administration, and for nearly two centuries after their

<sup>1</sup> (1902) 2 Ch., p. 132.

<sup>2</sup> At p. 139.

<sup>3</sup> 48 W.R., p. 236.

first reported appearance before an English court, foreign companies and corporations enjoyed perfect freedom to carry on business and discharge their other functions in England, free from the necessity for any preliminary permission or authorisation or from any other regulation or limitation. This treatment was, as Professor Westlake says, a very exceptional instance of liberality. Nor, as will be seen, was the general policy either of the law or of the administration affected by § 35 of the Companies Act of 1907<sup>1</sup>. That enactment indeed confirmed the above proposition, which has never been questioned, by assuming that foreign companies are free to carry on business in this country, and proceeding to impose certain restrictions, by no means severe, under special circumstances. Other foreign companies and corporations to which the statute had no application are still as free as ever to discharge their functions here.

There is but one exception to the liberality of the English *régime* in this respect. Section 28 of the Catholic Relief Act of 1829 (10 Geo. IV c. 7) recites "that Jesuits and other members of other religious orders or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom, and it is expedient to make provision for the gradual suppression and final prohibition of the same therein," and sections 28—35 of the same Act then require that all male regulars already within the United Kingdom should register themselves within six months of the passage of the Act, and forbid their entrance for the future, except for six months with the licence of the Secretary of State. Female regulars are expressly excepted. Section IV of 2 and 3 Will. IV c. 115 relating to Roman Catholic Charities and Section VII of the Roman Catholic Charities Act (24 and 25 Vict. c. 134) expressly preserve these provisions of the Roman Catholic Relief Act "respecting the suppression or prohibition of the religious orders or societies of the Church of Rome bound by monastic or religious vows." The latter enactments are aimed directly at the members of the orders and societies in question, and indirectly only at the orders and societies themselves. But if they had been enforced, they would have had the effect of preventing the orders and societies, the most important of which are foreign corporations, from exercising their functions in the United Kingdom. They

<sup>1</sup> Now § 274 of the Companies (Consolidation) Act, 1908.

have never been directly enforced, and it was never intended that they should be; and Jesuits and other regulars of the Church of Rome continue freely to fulfil the missions of their orders in this country. But the enactments have an important indirect effect. Whether enforced or not, they prohibit the existence of these orders and societies, and render them illegal, and bequests and devises to them, or for the promotion of their objects, are therefore also illegal, and wholly void. Thus a bequest for the education and maintenance of two priests of the Order of St Dominic in Ireland has been held in Ireland to be wholly void by the operation of the Roman Catholic Relief Act<sup>1</sup>; and bequests to the Superiors of the Franciscan, Capuchin, and Augustinian Orders for the repair and maintenance of churches, and for the purchase of a site for and building a church, have also been held there to be void as contrary to the policy of that Act since they were for the benefit of prohibited orders<sup>2</sup>. The prohibition of monastic bodies contained in the statute applies moreover to bodies which settled in the United Kingdom after the Act as well as to those which were then resident within it, so that a trust for the benefit of the Society of St Vincent de Paul, which left Ireland in 1690 and returned there in 1838, has been held in Ireland to be void<sup>3</sup>. A bequest for one in trust for a general charitable purpose is not however void because the trustee is a member of a prohibited order, and himself prohibited by the Roman Catholic Relief Act. Thus the bequest of an annuity to the monks of Shandon to provide clothing for poor children attending their schools has been held valid by the Irish court<sup>4</sup>.

It should be observed that orders and societies of females are expressly excluded from the operation of sections 28—35 of the Roman Catholic Relief Act, and since the enactment of the statute 2 and 3 Will. IV c. 115, and the Roman Catholic Charities Act (24 and 25 Vict. c. 134) bequests and trusts in their favour are valid, subject to the ordinary law of mortmain, perpetuities, and charitable and superstitious uses<sup>5</sup>. Before the

<sup>1</sup> *Sims v. Quinlan* (1865), 17 Ir. Ch. 43 (per Brady L.C.): see also *Hogan v. Byrne* (1862), 13 Ir. C. & R. 166.

<sup>2</sup> *Keehoe v. Wilson* (1880), 7 L.R. Ir. 10.

<sup>3</sup> *Liston v. Kegan* (1882), 9 L.R. Ir. 531.

<sup>4</sup> *Carbery v. Cox* (1852), 3 Ir. Ch. 231.

<sup>5</sup> *Cp. Cocks v. Manners* (1871), L.R. 12 Eq. 574.

enactment of these statutes all bequests and trusts in favour of Roman Catholic religious orders and communities were affected with the illegality of that religion itself<sup>1</sup>.

*The status and capacities of a foreign corporation in England are regulated by its personal law.*

8. The truth of this principle has generally been tacitly assumed in English decisions, or it has been referred to as obvious. There is no authority for it in the above general form, but it follows as a simple and necessary inference from the following rules which have been laid down to regulate the sphere of influence of the personal and the territorial law respectively.

*Whether a foreign association or other body possesses personal status or not must be determined by the law of the country whence it came.*

9. This rule is tacitly applied, or referred to in passing as obvious, even in the earliest cases, and it has been for the most part consistently observed. In *Henriques v. General Privileged Dutch Company*, King L.C.J. made the plaintiffs give in evidence at the trial the instruments whereby by the law of Holland they were effectually created a corporation there<sup>2</sup>; and in *The National Bank of St Charles v. De Bernales*<sup>3</sup> it was held that the plaintiffs, a Spanish corporation, must prove that they were incorporated in that country; and a copy of the incorporating charter from the King of Spain was produced from the proper place, the office of the Council of Castile. For an example of a recent application of the principle the case of *in re the Imperial Anglo-German Bank*<sup>4</sup> may be referred to. That was a creditor's petition to wind up a company, and the question was whether there was any company to wind up. The petition alleged that the company was incorporated by the law of the North German Confederation. It was admitted, however, that one of the formal acts required for incorporation by that law had not been performed: and it was held accordingly that by reason of its omission there never had been a formal incorporation of the

<sup>1</sup> *Cp. De Garcin v. Lawson* (1798), 4 Ves. 433 n. (bequest to Benedictine Monks of S. and N. Provinces), *Smart v. Prujean* (1801), 6 Ves. 567 (Legacy to Superior of a Convent).

<sup>2</sup> (1728) *Ld. Raym.* at p. 1535.

<sup>3</sup> (1825) 1 C. & P., p. 569.

<sup>4</sup> (1872) 26 L.T. N.S. p. 229.

company according to North German law, and that the company had never come into existence.

The rule is not without exceptions in special cases. The courts have at least once declined to recognise the personal status of a body which undoubtedly possessed it according to the law of the country whence it came, but which differed widely in type from any corporation known to English law. The case is that of *Bullock v. Caird*<sup>1</sup> which was an action for breach of an agreement. The defendant pleaded that the agreement was made with a firm domiciled in Scotland of which he was a member; that by the law of Scotland the firm was a person distinct from its members, and capable of being sued and of suing, of holding property and of being a debtor and creditor: and that judgment against the firm was a condition precedent to individual liability<sup>2</sup>. On demurrer it was held by the Court that these were matters of procedure only, which must be governed by the *lex fori*, and that the pleas were therefore bad: and it was said by Blackburn J. in explanation that it was quite clear that the firm was not a corporation. In view of the preceding cases, it is impossible to avoid the conclusion that this decision was wrong. Had the defendant pleaded that the firm possessed a limited personal status only, such as that possessed by English firms under Order 48 (a) and by some German associations, which permitted it to sue and be sued in its firm name but gave it no further corporate rights, the decision would have been right, for such capacities are no more than privileges or obligations of procedure. But here it was pleaded that the Scottish firm was capable of rights of property and contractual rights. These are not matters of procedure, but of the positive law of status and capacity. It should have been recognised that as such they ought to be regulated by Scottish law, and that the pleas were therefore good. The decision that they are matters of procedure conflicts with *General Steam Navigation Company v. Guillo*<sup>3</sup> in which a plea that an injury was inflicted, not by the defendant, but by a body in the nature of an English corporation of which he was a shareholder, and that by the personal law of that body the defendant was not liable, was

<sup>1</sup> (1875) L.R. 10 Q.B. 276.

<sup>2</sup> Cp. now Partnership Act, 1890, s. 4 (2) declaring Scottish law.

<sup>3</sup> Post, p. 192.

said to be good, obviously because these are matters for the personal law, and not matters of procedure for the *lex fori*. The observation of Blackburn J. although it reveals no doubt the true cause of the decision, is not really relevant. It is natural for an English court to exhibit disinclination to recognise the personal status of a foreign body which is neither a natural person, nor a corporation of any type known to English law. But it is not justifiable. The question was not whether the Scottish firm was a corporation, but whether it was a juristic person. Juristic personality is a genus of which the types of corporation known to English law are species only. To deny that any species other than those known to English law can belong to the genus is to deny that the question of person or no person is a question for the personal law, and to assert that it is a question for English law, and thus to disregard the best established of the general principles of private international law. It is also to disregard the cases referred to above, and those referred to below as establishing the rule that the internal constitution and capacities of a foreign corporation are to be governed by its personal law.

*Bullock v. Caird* is not, however, an isolated instance of the tendency to refuse to recognise the personal status of a foreign juristic person of a type unknown to English law. It has also been exhibited in the case of foreign sovereigns and states. It is admitted that "every Government in its dealings with others necessarily partakes in many respects of the character of a corporation<sup>1</sup>"; that the state "is a body so far corporate as not to present to the court as a suitor any one individual<sup>2</sup>"; and that, in short, "the case of a foreign government is the case of a corporation<sup>3</sup>." In accordance with these ideas no difficulty has been found in recognising the legal personality of Republics. But loyal adherence to the English theory that the state itself is no person, but is represented by a royal corporation sole, appears to have been the active cause in preventing a similar recognition from being extended to monarchical states. It has been said that the foreign monarch sues as a corporation sole<sup>4</sup>; or as

<sup>1</sup> *King of Two Sicilies v. Willcox* (1851), 1 Sim. N.S. 301; 89 R.R. 89.

<sup>2</sup> *Prioleau v. U.S.A.* (1866), L.R. 2 Eq. 659.

<sup>3</sup> *Republic of Peru v. Weguelin* (1875), L.R. 20 Eq. 140.

<sup>4</sup> *King of Spain v. Hullett* (1833), 7 Bli. N.S. 359; 1 Cl. & F. 333; 36 R.R. 123.



trustee for his subjects, or on his own behalf<sup>1</sup>. But the juristic personality of the foreign state as distinguished from the natural personality of the foreign monarch is not recognised by our law<sup>2</sup>. Since in most monarchical countries in which the national system of law is founded on that of Rome, which personified the fisc, the state is a person in private law, English courts apply their territorial law in this matter in derogation from the personal law.

In considering the effect of the foreign liquidation of a foreign company, the courts have disregarded the personal law in precisely the opposite sense, by forcing personality, as it were, upon a company that had ceased to possess it according to its personal law. No other construction can be put upon the case of *Gibbs and Sons v. La Société Industrielle et Commerciale des Métaux*<sup>3</sup>. The plaintiffs had contracted with the defendant, a French company, for the supply of copper in instalments. The contract was made and to be performed in England. When some of the instalments had been delivered, a judgment of judicial liquidation was pronounced against the defendant company by the French court. The liquidator gave notice to the plaintiffs that no further instalments would be accepted, and the plaintiffs then sued for damages for breach of contract. Evidence was given that the effect of the decree for liquidation according to French law was that the defendant company was dissolved for all purposes but liquidation, and could not thereafter *inter alia* sue or be sued; and it was argued that no action could lie against a non-existent person. The Court of Appeal held that the plaintiffs must succeed. No reference to the status of the defendant company was made in its decision, which was based upon the less fundamental consideration that a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled. This conclusion, however, tacitly assumes that the French decree that the company was no longer existent as a person was of no effect as regards its English creditors. From this point of view it is difficult to reconcile the decision

<sup>1</sup> *Hullett v. King of Spain* (1828), 2 Bli. N.S. 31; 28 R.R. 56.

<sup>2</sup> *U.S.A. v. Wagner* (1867), L.R. 2 Ch. 582.

<sup>3</sup> (1890) 25 Q.B.D., p. 399.

with general principles. It is at any rate a remarkable instance of the negation given by fact and practical necessities to the theory that the personality of a corporation is the fictitious creation of the law which brought it into existence. It is impossible to say that the *Société Industrielle* existed only in contemplation of French law, if it continued to be the *Société Industrielle* after French law had professed to destroy it.

*The law of the country in which it is domestic determines (1) the constitution of a foreign corporation; (2) the legal relations of its members inter se and towards the corporation, and (3) their liabilities towards third parties.*

10. These rules are simple and necessary inferences from the following cases and dicta.

(1) It has been said that although a company is a foreign company "its constitution as such should be respected and recognised by the legal tribunals of the country<sup>1</sup>." The rule must also necessarily be implied from decisions to the effect that the special rules of English law for the regulation of corporations or companies, such as the Companies Acts, do not in general apply to foreign corporations. By section 273 of the Companies (Consolidation) Act, 1908 (formerly section 204 in Part VIII of the Companies Act, 1862), relating to the winding up of unregistered companies, it is expressly provided that "an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this act, and then only to the extent provided by this part of this Act"; and it has been held that foreign corporations are unregistered companies within the meaning of this part of the Act<sup>2</sup>. Thus also in *Butt v. Monteaux* it was said by Page Wood V.C.<sup>3</sup> of a French *Société en Commandite* that it was "difficult to say, as

<sup>1</sup> *Gilbertson v. Ferguson* (1874), 5 Ex. D., p. 57, at p. 74, s.c. C.A. 7 Q.B.D., p. 562.

<sup>2</sup> *In re Mathison Brothers Ltd.* (1884), 27 Ch.D., p. 225; a Guernsey company is an "incorporated company" within the meaning of § 17 of the Bills of Sale Act (1882) so that its debentures are exempted from the operation of the Act. *Clark v. Balm, Hill & Co.* (1908), 1 K.B., p. 667; for a comparative analysis of the company laws of the British Empire, see the Government Blue Books [Cd. 3589] of 1907, and [Cd. 5864] of 1911.

<sup>3</sup> (1854) 1 K. & D. at p. 122.

against the shareholders who took their shares upon a representation that the Company was to be a *Société en Commandite*, that you could register it now—as an English company, subjecting them to a different class of liabilities.” Again, in *Bulkeley v. Schutz*<sup>1</sup>, an order was made by the British Consular Court at Alexandria that a company formed under Egyptian statutes should register itself under the English Companies Acts, for the protection of the shareholders. The Registrar of Joint Stock Companies refused to register the company. It was said by the Privy Council, whither the case came on Appeal from the Supreme Consular Court at Constantinople, that what the company was ordered to do was a thing which it could not do, since the Companies Act, 1862, “never contemplated that a foreign partnership actually complete and existing in a foreign country could be brought within the purview of the English Act of Parliament, the English legislature having no power over the shareholders of such a company.” In *Bateman v. Service*<sup>2</sup> it was held by the Privy Council that the Western Australia Joint Stock Companies Ordinance Act, 1858, which provides for the institution and regulation of companies, does not apply to companies incorporated elsewhere than in Western Australia and carrying on business there, and that a company incorporated and registered in Victoria could not be again registered under that Act in Western Australia, and on the point *Bulkeley v. Schutz* was expressly approved. The real question, it was said, was whether the legislature intended that its enactment should apply to foreign companies, and it was clear that it did not. The principle of these decisions has been expressly extended to colonial companies. In *New Zealand Loan and Mercantile Agency Limited v. Morrison*<sup>3</sup> it was said by Lord Davey in the Privy Council that “it is impossible to contend that the Company Acts as a whole extend to the Colonies.” Nor do they extend to India; for it was decided by the High Court in Bombay that one may bring an action in that court against a

<sup>1</sup> (1871) L.R. 3, P.C. 764.

<sup>2</sup> The actual decision of the Privy Council reversed, not the original order of the Court at Alexandria, which was not open to question there: but an order made by the Court at Constantinople, reversing the Court at Alexandria, permitting sequestration in default of failure to comply with the original order of the Court at Alexandria. In effect, however, the decision disapproved and negatived the original order.

<sup>3</sup> (1881) 6 A.C., p. 386.

<sup>4</sup> (1898) A.C., p. 349 at p. 355.

company being wound up in the Court of Chancery in England without the leave of the latter court under sec. 87 of the Companies Act of 1862<sup>1</sup>, and this was confirmed by a dictum of Mellish L.J. *in re Oriental Inland Steamship Company*<sup>2</sup> that sections 87 and 163 of the Act<sup>3</sup> apply only to English courts, for Parliament does not legislate respecting the colonies or India unless they are expressly mentioned. It is clear that the above decisions are an express disavowal on the part of our law of the doctrine of the restrictive school, discussed in the first part of this work, which would subject foreign juristic persons to the whole territorial law relating to juristic persons, and deny them the possession of a personal law.

In the following case the nature and extent of the personal law of a company was considered from the opposite point of view, that of an English company abroad<sup>4</sup>. A railway company was incorporated by Act of Parliament to carry from London to Folkestone. The Act prohibited unequal charges. The company obtained a second Act enabling them to convey from Folkestone to Boulogne. This Act did not prohibit unequal charges: nor does the law of France prohibit them. The company charged double rates for "packed parcels." It was held that as to conveyance from Boulogne to London this charge was not illegal. Against the company it was argued that laws regulating capacity are personal laws, and that qualified authority to contract follows a company abroad. The court left that question undecided, holding that "even if the railway legislation for England could be construed to have an extra territorial effect and impose on an English railway company in France the capacities and incapacities with which they are affected in England<sup>5</sup>," still the particular provisions did not deprive the company of capacity to make the particular contract in question.

The question thus left undecided is of great theoretical importance. In the absence of an express decision, the general principles which must be taken into consideration in answering

<sup>1</sup> Now § 142 of the Companies (Consolidation) Act, 1908. *Bank of Hindustan v. Premchand Raichand*, 5 Bomb. H.C. Rep., p. 83.

<sup>2</sup> (1874) L.R., 9 Chap. at p. 559.

<sup>3</sup> Now §§ 142 and 211 of the Companies (Consolidation) Act, 1908.

<sup>4</sup> *Branley v. South Eastern Rly. Coy.* (1862), 12 C.B., N.S., p. 63.

<sup>5</sup> Per Erle C.J. at p. 72.

it, and which have been fully discussed in the first part of this work, may be stated briefly as follows. In order to determine whether any particular provision of English law is part of the personal law of an English company, and has extra-territorial effect, English courts have of course in the first place to consider the intention of the English legislature as to whether it should have such an effect or not. If no intention has been expressed by the legislature positively or negatively and if there is no necessary implication as to such an intention from the particular circumstances of the enactment in question, the courts in deciding whether the enactment has extra-territorial effect or not, must be ruled by the generally accepted principles of private international law. The relevant principle, as has been seen, is that those enactments which relate to the permanent legal character and constitution of a juristic person and to the relations of its members *inter se* and towards the juristic person itself, and those only, are to be regarded as part of its personal law, having extra-territorial effect: and that particular enactments such as restrictions on capacity, which are made, typically, not in relation to the constitution of the body and the relations of its members *inter se*, but to protect the interests of third parties, subjects of the enacting state, are not to be regarded as forming part of the personal law; because a state cannot exercise its legislative powers over the subjects of other states, even to protect them. The application of this principle is twofold, as regards foreign corporations here, and as regards English corporations abroad. If the legislature or the courts of a foreign state disregard it in relation to English companies abroad, our courts are not bound by their action. This was the substance of the decision in the important case of *Ridson Iron and Locomotive Works v. Furness*<sup>1</sup>. A company was registered with limited liability under the Company Acts to acquire and work mines in California. It commenced business, and purchased machinery from the plaintiffs in California. By Californian law, every shareholder of a company trading in California, whether incorporated in California or elsewhere, is personally liable for a proportion of the company's debts. The company became insolvent; and the plaintiffs sued the defendant here as a shareholder in the company for his proportion of the price of

<sup>1</sup> (1906) 1 K.B., p. 49.

over state of foreign corp  
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the machinery. The action failed. It was said by Kennedy J. in the court below<sup>1</sup> that "a proceeding on the part of the company to enlarge the boundary of the liability of a shareholder beyond the boundary fixed by the constitution of the company, must in an English court be held to be *ultra vires*"; and by Collins M.R. confirming his decision, that "though there are general provisions as to the company carrying on business in foreign countries, there is always the underlying and essential fact that it is a limited company. The authority to do these things is given to a limited company and it can only do them subject to the limited liability of its shareholders, which is a fundamental condition of its existence." It was also held that on the facts of the case it could not be inferred that the defendant had authorised the company to carry on business on the terms that he should incur a collateral liability according to the law of California different from his liability under the constitution of the company. Thus it appears that the constitution of an English company is a matter for its personal law, which is English law; and no foreign legislation which seeks to affect its constitution in derogation from its personal law can have international validity.

With this case may be compared that of *Spiller v. Turner*<sup>2</sup> which also illustrates the application of the principle. An English company carried on business in the colonies. It passed resolutions entitling its preference shareholders to cumulative interest in priority to ordinary shareholders. By a subsequent act of a colonial legislature a duty resembling income tax was imposed on all dividends paid out of assets in the colony to members of the company. It was held that rights under the English contract between preference and ordinary shareholders could not be affected by the colonial statute except in the case of members of the company domiciled in that colony, and the preference shareholders were entitled to this interest without any deduction in respect of the colonial duty. (More generally stated, the substance of this decision is that the rights of the members of the company *inter se* must be governed by the personal law of the company, and that the legislation of other states which assumes to interfere with them in derogation from the personal

*But in Spiller case Eng Ct*  
 (1905) 1 K.B. 304. (1897) 1 Ch., p. 92.

*admitted jurisdiction over members of the company*

law can have no international validity, but can affect its own territories and subjects only.

The case of Bank of Australasia v. Harding<sup>1</sup> serves as a contrast with the last case. It was there held that the English members of a company which was formed for the purpose of carrying on business abroad, but which was unincorporated, were bound by a statute of the country in which the business was carried on, which authorised an unincorporated company to sue and be sued by its chairman as agent for the members, without notice to the latter. This statute, relating to matters of procedure, and enacted in the interests of third parties, was typically of the sort which has territorial application, and must be universally recognised to supersede the provisions of the law of the country from which a company comes.

Conversely the above principle must guide our courts in determining what is the content of the personal law of foreign corporations. They would of course be bound, as has been pointed out, by legislative enactments which showed an intention on the part of our legislature to infringe the principle, either expressly or by necessary implication. But in their absence the general principle holds, that those enactments of our law which relate to the legal character and constitution of corporations and the relations of their members *inter se* and towards the corporation, do not affect foreign corporations. Such matters are for their personal law. "The proper construction to be put upon general words used in an English Act of Parliament," it has been said<sup>2</sup>, "is that parliament was dealing only with such persons or things as are within its proper jurisdiction." It must be assumed therefore that enactments dealing with the constitution of corporations in general terms do not affect corporations outside the jurisdiction of Parliament and domestic in some foreign state. This is the principle of the cases first referred to in this section. On the other hand particular enactments of our law, such as restrictions on capacity, made to protect the interests of third parties, and not relating to the constitution of corporations, and no part of our law of corporations in general—these must be applied to a foreign corporation, to the exclusion of the

<sup>1</sup> (1850) 9 C.B., p. 661: cf. *Bank of Australasia v. Nias* (1851), 16 Q.B., p. 717; *Kelsall v. Marshall* (1856), 1 C.B., N.S., p. 241.

<sup>2</sup> *Colquhoun v. Heddon* (1890), 25 Q.B.D., p. 129; per Esher M.R. at p. 135.

similar enactments made in relation to it by the state from which it comes. An instance will illustrate this principle. It may be said to be obvious that a foreign company is subject here to our law of mortmain, and its capacity to hold real estate is limited by that law, to the exclusion of the capacities conferred upon it in this respect by the laws of its native state. This principle is generally recognised on the continent. It is agreed that such enactments affect all juristic persons within the jurisdiction of the state which enacted them on the grounds that they relate to "public order."

In the absence of evidence to the contrary it will be assumed by our courts that the general principles of law governing the constitution of corporations are identical in all systems of law. It has been said, for instance, that "it is not a mere canon of English Municipal Law but a great and broad principle which must be taken (in the absence of proof to the contrary) as part of any system of jurisprudence, that the governing body of a corporation which is a trading partnership—that is to say the ultimate authority within the Society itself—cannot in general use the funds of the community for any purpose other than those for which they were contributed. Therefore the special powers given to such ultimate authority by the constituent documents of the Association (however absolute in term) are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association<sup>1</sup>."

✕ (2) The best authority for this part of the rule is the case of *Sudlow v. The Dutch Rhenish Railway Company*<sup>2</sup>. It was there held, not only that the legal relations of a member towards the corporation were matters for its personal law, but that the courts of the state in which the foreign corporation was domestic were the proper tribunals to decide them, and that an English court would not review their decisions. ✓ The foreign corporation was a Dutch Railway Company, against which an English shareholder filed a bill for relief against a forfeiture of shares. There was a decision of the Dutch courts against the plaintiff and on those grounds alone the bill was dismissed. *Pickering v. Stephenson* (*sup.*) also supports the rule. The matters at issue

<sup>1</sup> *Pickering v. Stephenson* (1872), L.R. 14 Eq. per Wickens V.C. at p. 339.

<sup>2</sup> (1855), 21 Beav., p. 43.



were the powers of the directors of a Turkish company<sup>1</sup>. A bill had been filed by a shareholder in the company against the directors, seeking *inter alia* an injunction restraining them from applying the funds of the company to the costs of criminal proceedings taken by them against one who had libelled them : and although there was no evidence of Turkish law applicable to the case, the injunction was granted. All the parties were resident in England, and the company was managed by a Council here, and on those grounds, apparently, the court accepted jurisdiction over what was purely a domestic dispute about the internal affairs of a company whose business was in Asia Minor, and formal seat at Smyrna.

X Another application of the principle may be seen in the refusal by the Court of Chancery to restrain the members of a foreign corporation from applying to their own legislature for an increase of capital<sup>2</sup>. X

It will be seen hereafter<sup>3</sup> that foreign companies which have a branch office here are considered by our courts to be subject to the provisions of our Company Acts relating to the winding up of companies. At first sight this may appear to be inconsistent with the rule stated above, inasmuch as it disregards the personal law of the company in a matter relating to its constitution and the relations of its members *inter se*, and applies to it the territorial law. But it is not so in reality. It is consistent with general principles that the territorial law, and not the company's personal law, should decide when a foreign company ought to be wound up, because rules made for determining the circumstances under which a company ought to be wound up are made in the interests of third parties, subjects of the state, and relate, as continental jurists would say, to public order. Further, as it has been said, "there is a material distinction between the effect of a bankruptcy and a winding up. In the former case the whole property of the bankrupt is taken out of him, whilst in the latter case the property remains vested in title and in fact in the company, subject only to its being administered under the direction of the English court<sup>4</sup>." Bankruptcy is intended to

<sup>1</sup> (1872) L.R. 14 Eq. per Wickens V.C. at p. 339.

<sup>2</sup> Bill v. Sierra Nevada Lake Water and Mining Coy. (1859), 1 D. & G., F. & J., p. 177.

<sup>3</sup> Post, p. 268.

<sup>4</sup> New Zealand Loan & Mercantile Agency Company Ltd. v. Morrison (1898), A.C., p. 349, per Ld. Davey at p. 355.

operate upon all the property of the bankrupt, wherever situated, and to affect his status. The powers of a liquidator in a winding up can be confined to the local property of the company: nor does the order necessarily affect its status. In deciding that a foreign company must be wound up the court does not assume to dissolve it. The effect of its decision is only to withdraw from the company that recognition as a person and permission to carry on business which is extended to all foreigners. In so far as particular rules of our law are applied in the winding up, they are in the nature of rules of procedure and therefore properly matters for the *lex fori*: and it is fully recognised that it is proper to apply the personal law of the company in determining the constitution of the company and in arranging the rights and liabilities of its members.

In illustration of this the decision of Wigram V.C. *in re* The Dendre Valley Railway and Canal Company<sup>1</sup> may be quoted. That was the case of a petition to wind up under the repealed acts of 1848 and 1849 an unincorporated company formed in England to establish in Belgium a *Société Anonyme* to construct a railway and canal in Belgium: and it was said "a party of Englishmen may have a partnership confined to themselves for constructing a railway in a foreign country. Then the contract may be subject to the Winding Up Acts as part of the law of this country, but the law to determine the rights of the parties may be the law of the country where the railway is to be constructed. The law of Belgium must be averted to for determining what the rights of the shareholders are."

Another apparent exception to the principle is to be found in the effect attributed by our law to the measures taken in the foreign administration of a foreign company. In *Gibbs and Sons v. La Société Industrielle et Commerciale des Métaux*<sup>2</sup> it was held that the defendants, a French company, were not discharged from liability under a contract made and to be performed in England by a discharge in a liquidation of the company under the law of France. The basis of the decision was thus stated by Esher M.R.<sup>3</sup>: "the parties are taken to have agreed that the law of [the country in which the contract was

<sup>1</sup> (1850) 19 L.J., Ch. p. 754.

<sup>2</sup> (1898) A.C., p. 399.

<sup>3</sup> At p. 405.

made and to be performed] shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. It is now however suggested that, where by the law of the country in which the defendants are domiciled the defendants would under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made or to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated: it is the law of another country by which they have not agreed to be bound." It might be said that this decision conflicted with the accepted principles as to the sphere of the personal law; that it disregarded that law in favour of the *lex loci contractus*, because the decree or other decision in the foreign liquidation discharging it from liability and thereby affecting the rights and liabilities of its members, should be considered to become a part of its personal law. However that may be, the rule laid down in the above case is not peculiar to corporations and companies. It applies equally to natural persons and the sphere of their personal law<sup>1</sup> and is but one of many instances of the special favour shown by English law to the *lex loci contractus*. The reasoning of Lord Esher's judgment lays itself open to the objection that one who deals with a foreign company has notice of its origin and constitution, and contracts with it subject to all the incidents which according to the law of its constitution may affect its liability upon its contracts. This argument was in fact advanced in the case of *New Zealand Loan and Mercantile Agency Company Ltd. v. Morrison*<sup>2</sup>, a case substantially identical with that last considered. An English company carried on business in Victoria. An order for its compulsory winding up was made in England; and subsequently a scheme of arrangement under the Joint Stock Companies

<sup>1</sup> Cp. *Armani v. Castrique* (1844), 13 M. & W., p. 447.

<sup>2</sup> (1898) A.C., p. 349.

Arrangement Act, 1870<sup>1</sup>, was accepted and sanctioned. A creditor who had not assented to the scheme sued the company for her debt in Victoria. The Victorian Court held that the scheme was no answer to her action: and this decision was upheld on appeal to the Privy Council. It was held in the first place that unlike the Bankruptcy Acts neither the Company Acts in general nor the Arrangement Act of 1870 in particular apply to the colonies, and that as far as regards Victoria the arrangement was a foreign proceeding: and secondly, that this being so, the principle established in *Gibbs v. Société Industrielle &c.*, applied. The objection stated to the decision in that case was referred to and disregarded<sup>2</sup>. It was pointed out that to assume that a discharge from liabilities by the order of the foreign court is an incident which affects the contract is to beg the question, because the discharge can operate only so far as the jurisdiction of that court extends: and that brings the matter back to the same point.

X (3) It is said in *Lindley on Partnerships* that "if a company is incorporated by a foreign government so that by the constitution of that company the members are rendered wholly irresponsible or only to a limited extent responsible for the debts and engagements of the company, the liability of the members as such would be the same in this country as in the country which created the corporation<sup>3</sup>." This statement of the law was adopted and applied by the Privy Council in its judgment in *Bateman v. Service*<sup>4</sup>. X It was founded no doubt upon the following earlier cases. In *General Steam Navigation Company v. Guillou*<sup>5</sup> there was declaration in case for injury to the plaintiff's ship on high seas by the defendant's ship. It was pleaded that the offending ship was the property of a company incorporated by the laws of France, in which the defendant was a shareholder only: and that by French law the company only was liable, and not the defendant individually. It was held that if this plea meant that not the defendant, but a body in the nature of an English corporation, owned the vessel and was alone liable, it was good: but bad if it meant no more than that under French law the defendants must be sued jointly with the other shareholders

<sup>1</sup> Now §§ 120 and 294 of the Companies (Consolidation) Act, 1908.

<sup>2</sup> Per *Ld. Davey* at p. 359.

<sup>4</sup> *Sup.* per Sir R. Couch at p. 388.

<sup>3</sup> (1878) 4th ed., vol. 1. p. 1487.

<sup>5</sup> (1843) 11 M. & W., p. 877.

under the name of the association. In the latter case, of course, the plea would relate to matters of procedure only, which would be for the *lex fori*. The court were evenly divided as to which it meant: but their hypothetical decision as to the first alternative accepts the principle that the liability of members of a foreign corporation to third parties is in general to be referred to the personal law of the corporation.

X In accordance with this principle, an Englishman who becomes a shareholder in a foreign company becomes subject to the articles and constitution of the company. This was decided in *Vallée v. Dumergue*<sup>1</sup> which was an action on a French judgment. X The defendant pleaded that he was not a French subject or resident there or within the jurisdiction of the French court; that he was never served with process and received no notice of the proceedings there, and did not appear in them. There was a replication that the defendant became a shareholder in a French company and subject thereby to all liabilities and rights attaching thereto; that as a member of the company he elected domicile at Paris; and that the service was accordingly good by French law. On demurrer the replication was held good. This decision was followed and explained in *Copin v. Adamson*<sup>2</sup>, also an action on a foreign judgment. The defendant advanced pleas similar to those in *Vallée v. Dumergue*: and the replication was that the defendant was the holder of shares in a company legally domiciled in Paris, and subject thereby to all liabilities, rights and privileges of a shareholder, and to the conditions in the Articles of Association: that the Articles provided for service in a certain manner, and that it was in that manner that service had been effected. It was held on demurrer that the replication was good. It was said by Kelly C.B. in the court below<sup>3</sup>: "it is now established as the law of the country that one who becomes a shareholder in a foreign corporation and therefore and thereby a member of the company, such company existing in a foreign country and subject in all things to the law of that country, himself becomes subject to the law of that country, and to the articles of the constitution of that company, construed and interpreted according to the law of that country in all things—in relation to the affairs of such

<sup>1</sup> (1849) 4 Ex. R., p. 290.

<sup>2</sup> (1875) L.R. 9 Ex., p. 345, 1 Ex. D., p. 17.

<sup>3</sup> At p. 349.

company and its members: and if that company is subject to the jurisdiction of a particular court within that country so also is each shareholder or member subject to its jurisdiction, in all cases in relation to such company."//The matter was put somewhat less generally by Lord Cairns L.C. in the Court of Appeal. He said "the question might arise whether without any express averment by the law of France as by that of every civilised country the shareholder would not be bound by the statutes of the company in which he was a shareholder": but that that question did not arise in the case under discussion, since it was as if there had been an actual and absolute agreement by the defendant<sup>1</sup>. It is difficult to see any distinction in principle between the general and the particular case here differentiated. A shareholder is bound by the statutes of the company because by becoming a shareholder he agrees, tacitly no doubt, but actually and absolutely to be bound by its constitution in all respects.

*A corporation resides wherever it carries on business at an office or other place of business. Its principal residence is at that place at which the principal centre of its administrative business is situated.*

II. The first part of this rule follows from decisions as to jurisdiction and service of process, which are dealt with hereafter under those headings<sup>2</sup>. It will be seen that they establish that a corporation resides or dwells wherever it has a place of business, and that inasmuch as it can have several places of business so also it can have several residences, for the purpose of jurisdiction and other purposes. Strictly speaking, we must no doubt say that they decide only that a corporation is present wherever it has a place of business, for presence and not residence or a dwelling within the jurisdiction is sufficient in order that a person may be subject thereto. *A priori* therefore it would be more satisfactory to state the first part of the rule to be that a corporation is present wherever it carries on business &c., and to reserve the name of residence for the principal residence only. But the word residence is commonly used in reported decisions to describe the subsidiary residence, at which presence only is demanded by the principles of the common law: and it would

<sup>1</sup> Ex. D. at p. 19.

<sup>2</sup> Post, p. 239.

be misleading to attempt to enforce a distinction which they have not recognised. In the case of corporations moreover which are by nature so much less ambulatory than natural persons, it would be a distinction without much difference. Our law however distinguishes sharply between subsidiary residences and the principal residence, and attaches an importance to the latter which is not shared by the former. This results from the necessity of applying to corporations statutes and rules referring either expressly or by necessary implication to the principal residence or dwelling as distinguished from other residences, and the principles of the common law which involve a consideration of the same particular.

The County Courts Act, 1846 (9 and 10 Vict. c. 95), related to the establishment of County Courts and their jurisdiction. It was repealed by para. 188 of the County Courts Act, 1888 (51 and 52 Vict. c. 43). Its 128th section relates to the concurrent jurisdiction of the superior courts when "the plaintiff dwells more than twenty miles from the defendant" or where a cause of action did not arise "within the jurisdiction of the court within which the defendant dwells or carries on his business." In interpreting this section it was first decided generally that a company dwells at the place where its business is carried on<sup>1</sup>; and then, negatively, that a Railway Company does not carry on business at a receiving house or booking office kept by an agent for several railways generally<sup>2</sup>. It was next decided positively that the Great Western Railway Company dwelt within the meaning of the section at Paddington, where the directors met, the secretary resided and meetings were held, and whence orders emanated<sup>3</sup>; and finally the principle was stated generally that "a joint stock company dwells within the meaning of the County Court Acts where the substantial business of the company is carried on, and negotiations; not necessarily where its property is situated and objects carried out<sup>4</sup>." On the other hand in another case<sup>5</sup> it was held that a

<sup>1</sup> *Taylor v. Crowland Gas & Coke Co.* (1855), 11 Ex., p. 1.

<sup>2</sup> *Minor v. L. & N. W. Railway Co.* (1856), 1 C.V. N.S. 325.

<sup>3</sup> *Adams v. G. W. Rly. Co.* (1861), 6 H. & M. 404.

<sup>4</sup> *Aberystwyth Promenade Pier Co. Ltd. v. Cooper* (1865), 35 L.J. Q.B., p. 44: cp. also *Oldham Building & Manufacturing Co. v. Heald* (1864), 3 H. & C., p. 132.

<sup>5</sup> *Keynsham Blue Lias Co. Ltd. v. Barker* (1863), 2 H. & C., p. 71.

joint stock company dwelt for the purposes of the section at the place at which it carried on its manufactures and made sales, and not at its registered offices where the directors met. This decision fails to make the vital distinction between the administrative business of a company in which is its organic life, and the routine business which is nothing more than the exercise of its functions. It cannot therefore be reconciled with the two preceding cases, in which that distinction is clearly drawn and applied.

Section 60 of the same Act of 1846 relates to the issue of a summons "in any district in which the defendants or one of the defendants shall dwell or carry on his business." In interpreting this section it was held that a Railway Company does not carry on its business at every place where it has a station, but only at the principal office where the directors meet and the general business of the company is transacted<sup>1</sup>. So also it was held that a Railway Company carries on business only at the principal station where the general superintendence of the whole concern is centred: and not at any station where the local management is conducted subject to the superintendence of the General Manager<sup>2</sup>.

Section 12 of the Mayors Court of London Procedure Act, 1857, provides that in certain cases no plea is to be allowed to the jurisdiction provided that the defendant "shall dwell or carry on business within the City of London" etc.: and it was held that the South Eastern Railway Company did not carry on business within the meaning of this section at Cannon Street, where much of their business was transacted, but at the place where the directors met and the general administrative business of the company was conducted<sup>3</sup>.

To the like effect is the decision in *Jones v. Scottish Accident Insurance Co. Ltd.*\* where the provision to be interpreted was that of Order 11, rule 1 (e) of the Rules of Court of 1883, that leave cannot be given to serve a writ out of the jurisdiction when the cause of action is as described in that sub-section, but the

<sup>1</sup> *Shields v. G. N. Railway Co.* (1861), 30 L.J. Q.B., p. 331; *Shields v. G. N. Railway Co.*, 7 Jur. N.S., p. 631.

<sup>2</sup> *Brown v. L. N. W. Railway Co.* (1863), 32 L.J. Q.B., p. 318.

<sup>3</sup> *Le Tailleur v. S. E. Railway Co.* (1877), 3 C.P.D., p. 18.

<sup>4</sup> (1886) 17 Q.B.D., p. 421.



defendant is "domiciled or ordinarily resident" in Scotland or Ireland, and it was held that a company is "ordinarily resident" within the meaning of the rule where its chief or head office is situate.

It is clear from the subject matter of the provisions in question that the dwelling and place of business to which they referred was a principal and permanent dwelling or place of business of a sort of which each person would *prima facie* have only one. The above decisions as to where a company dwells or has a place of business or is ordinarily resident are therefore in effect decisions as to the principal residence of a company, residence and place of business in the case of a company being one and the same thing. The case of *Garton v. Great Western Railway Company*<sup>1</sup> is an express decision as to the principal office of a company. Section 138 of the Railway Clauses Consolidation Act, 1845, provides that process or notices may be served upon a company by leaving them at or transmitting them through the post to "the principal office of the company, or one of their principal offices if there shall be more than one." It was held that the principal office of the Great Western Railway Company within the meaning of this section was at Paddington where all the general business was transacted and the secretary resided, and whence orders were issued; although the yearly general meetings had by the Company's Act to be held alternately at London and Bristol. It will be seen that in all the above cases, with the exception of *Keynsham Blue Lias Co. Ltd. v. Barker (sup.)*, a distinction is drawn between the centre of administrative business of the company and the principal scene of its operations, where it discharges its functions; and the principal dwelling, office, place of business, or residence of the company is determined to be at the centre of administrative business. The principle, it will be seen, is further confirmed and applied in cases relating to taxation, but it should be here noted that in the case of *South Africa Breweries Limited v. King*<sup>2</sup> there is to be found a dictum of Kekewich J. which is in apparent disagreement with it. The plaintiffs, an English company, carried on business at Johannesburg. They made a contract there with a resident

<sup>1</sup> El. Bl. & El., p. 837.

<sup>2</sup> (1899) 2 Ch., p. 173.

British subject for his services as brewer in South Africa. The contract was in the English language and form. It was held that the incidents of the contract were governed by the law of the South African Republic. In a decision confirmed on appeal<sup>1</sup>, Kekewich J. said "the residence of the contracting parties always has been noticed as an important element in the decision of such a question as arises here"; *i.e.* what law was to govern the contract; and later: "It is not in my opinion according to sound ideas of business, convenience, or sense to say that a company having a registered office with directors and secretary in England, not, however, otherwise carrying on business here, but carrying on business in South Africa, must be treated as resident in England for the purpose of ascertaining whether a contract entered into by them respecting their business in South Africa was intended to be governed by English law or the local law." In this dictum the learned judge would clearly prefer to choose the scene of operations rather than the centre of administrative business as the residence of the company. His reasoning is not expressly adopted by the Court of Appeal nor could it prevail against the weight of authority to the contrary. It may be suggested in addition that it is not in itself satisfactory, and that the true conclusion under the circumstances was, not that the residence of the company for the special purpose should be considered to be at some place other than the centre of administrative business, where by common consent it is for all other purposes; but that, for the purpose of deciding the law applicable to a contract, the residence of a company need not, under the special circumstances, be considered to have the same weight as would the residence of a natural person.

The rule that a company's residence is at its centre of administrative business has been adopted and applied in the series of carefully and fully reasoned decisions in which the residence of a corporation for the purposes of income tax has been discussed. It will be seen, however, that in these cases the centre of administration has had to contend less with the scene of operations than with the place of registration for the privilege of determining the place of residence. Schedule D of section 2 of the Income Tax Act, 1853, makes duties payable (*a*) in respect of profits "accruing to any person residing in the United

<sup>1</sup> (1900) 1 Ch., p. 273.

Kingdom" from any kind of property whatever and from any trade etc. wherever carried on: and (b) in respect of profits accruing to any person whatever "although not resident within the United Kingdom" from any property in the United Kingdom, on any trade etc. "exercised within the United Kingdom." In the following cases the residence of a company within the meaning of this section has been considered. In *Attorney General v. Alexander*<sup>1</sup> it was held that the Imperial Ottoman Bank, a Turkish company, was not resident within the United Kingdom under clause (a). "Does the Imperial Ottoman Bank reside in England?" asked Kelly C.B.<sup>2</sup> "No: the London business is a mere branch. London is not the chief seat of carrying on the business of the Bank. If it is resident anywhere it is resident at Constantinople where alone it has its seat under the express terms of its charter." It was said by Amphlett B.<sup>3</sup> "a person cannot be said to reside wherever he carries on business. How then can a foreign corporation be said to reside within the kingdom for no other reason than that it carries on (some of its) business there? A corporation may be said to reside wherever it has its seat." It appears from the circumstances of the case that by seat in these judgments is meant the centre of administrative business. The dictum of Amphlett B. that a person does not reside wherever he carries on business is no doubt true of natural persons. It cannot with accuracy be applied to corporations; the cases on service and jurisdiction suffice to show that for these purposes a corporation does reside wherever it carries on business. The "mere branch" referred to by Kelly C.B. would have been a residence sufficient for the purposes of jurisdiction: and this marks the distinction, developed in later cases, between residence for purposes of jurisdiction, which is subsidiary, and residence for purposes of Schedule D, which is interpreted in the cases to mean a principal residence. In the *Cesena Sulphur Co. Ltd. v. Nicholson*, and *The Calcutta Jute Mills Co. Ltd. v. Nicholson*<sup>4</sup>, cases argued and decided together, the subject was fully discussed and much elucidated. It was there held that the appellant companies which were registered under the Company Acts to work mines in Italy and to manufacture jute in Bengal respectively were

<sup>1</sup> (1874) L.R. 10 Ex., p. 20.

<sup>2</sup> At p. 30.

<sup>3</sup> At p. 33.

<sup>4</sup> (1876) 1 Ex. D., p. 428.

resident within the United Kingdom within clause 1 of Schedule D. It was said by Kelly C.B.<sup>1</sup> "whether there may or may not be more than one place at which the same Joint Stock Company may reside I express no opinion at present. A Joint Stock Company resides where its place of incorporation is, where the meetings of the whole company are held—or of those who represent it, and where its governing body meets in bodily presence for the purposes of the company and exercises its powers. The Great Western Railway Company resides at Paddington and the London and North Western Railway Company resides at Euston, because there is the principal seat of business of the company, there the directors meet and exercise their powers, there the books are kept and from there the great lines emanate": and by Huddleston B.<sup>2</sup>, "The use of the word residence is founded upon the habits of a natural man and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons. There is not much difficulty in defining the residence of a natural person. It is where he sleeps and lives—therefore when you deal with a trading company it means the place, not where the form or shadow of business, but where the real trade and business, is carried on. There is a German expression applicable to it which is well known to foreign jurists, '*Der Mittelpunkt der Geschäfte*'; and the French term is '*le centre de l'entreprise*'; the central point of the business. The Attorney General cited a proposition to which I cannot assent. He suggested that the registration of a company was conclusive of its residence, that if a company was registered in England it must be held to reside in England. Registration like the birth of an individual is a fact, which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of residence. So drawing an analogy between a natural and artificial person you may say that in the case of a corporation the place of its registration is the place of its birth and is a fact to be considered with all others. If you find that a company

<sup>1</sup> At p. 444.<sup>2</sup> At p. 452.

which is registered in a particular country acts in that country, has its office and receives dividends in that country, you may say that those facts coupled with the registration lead you to the conclusion that its residence is in that country," and later: "the artificial residence which must be assigned to the artificial person called a company is the place where the real business is carried on."

In this most valuable judgment the question of the importance to be allowed to the place of registration in determining the residence of a company is raised, and practically settled. It is true that it is not perfectly clear from the words of the learned Baron what sort of attention is to be paid to that circumstance: it is to be considered, but ultimately the situation of the centre of administrative business is to decide. Apparently therefore it is only to be considered as *prima facie* evidence as to where the centre of administrative business is, in the absence of direct evidence upon that point. Direct evidence of the sort is however easily obtained: and the importance of the place of registration is in consequence practically nothing. This is consistent with the cases as to jurisdiction and service, in which, as has been seen, it has been decided that for the purpose of service of process a company is not to be considered as confined to the country in which it was registered and incorporated, but that it can travel and be found abroad, so that a writ can be served upon it. It is fully confirmed by the subsequent decision in *Goerz & Company v. Bell*<sup>1</sup>. It was there held that a corporation which was registered at Pretoria under the laws of the South African Republic, but which was practically controlled by directors who met in London, was resident within the United Kingdom within the meaning of clause (a) of Schedule D. It was said by Channell J.<sup>2</sup> that a company, which in one sense has no physical existence, cannot be said to dwell in the ordinary sense of the word at any particular place, yet a residence must be attributed to it. Proceeding to consider the relative claims of the centre of administrative business and of the place of registration he says: "A company does get a certain amount of benefit from the government both in its registration under the laws of a country and the rights which it derives from its registration. On the other hand by having its

<sup>1</sup> (1904) 2 K.B., p. 136.

<sup>2</sup> At p. 145.

head office here and doing its business here through its board, this company does get a certain amount of benefit from the law and government of this country. The question is, I think, whether the registration and incorporation of this company in South Africa prevents it being resident in the United Kingdom, for it is possible—though I do not decide the question—that the company may have two residences. An individual undoubtedly may have more than one residence for many purposes, and I think that he may for purposes of taxation. The condition of things might be the same with regard to a company. Although the company, by getting itself registered in the South African Republic, undoubtedly desired, so far as that term is applicable to a company before incorporation, to take advantage of the law of that country, yet, having regard to the constitution of the company as appearing from its articles, I can see nothing to prevent it after incorporation from residing elsewhere, either instead of, or as well as, in the South African Republic, and I think that the company did reside elsewhere. Upon the dicta to be found in past decisions I think that this company must be taken to be resident in the United Kingdom.” It was thus directly decided that the place of registration of a company is not conclusive of its principal residence, and that it must be disregarded, in determining that circumstance, in favour of the place of its head office, which is its centre of administrative business. This is fully confirmed by the judgments of the House of Lords and Court of Appeal delivered in the case of *De Beers Consolidated Mines Ltd. v. Howe*<sup>1</sup>. The appellants were registered in Griqualand West in the Colony of the Cape of Good Hope. The directors met at Kimberley and in London, but the London directors were in the majority and controlled the general policy of the company. It was held that the company resided within the United Kingdom within the meaning of clause (a) of Schedule D. It was said by Collins M.R.<sup>2</sup>, “the company had a local habitation in London which though not named the head office really was in effect the head office, so it resides in London,” and again “the head and brains of the company are to be found in London and the real conduct of the adventure takes place there. It does not, in my opinion, matter whence the subject matter with which the business deals is drawn.”

<sup>1</sup> (1905) A.C., p. 455; s.c. (1905), 2 K.B., p. 612.

<sup>2</sup> At p. 633.

Cozens Hardy L.J. said<sup>1</sup>, "It is not open to us to assent to the proposition urged by Mr Cohen, namely, that it is impossible for a corporation ever to be resident anywhere except in the country in which it was incorporated. No doubt its residence in this country might be so temporary that, though sufficient for the purposes of service, it might not be sufficient to render the corporation liable to the operation of the laws relating to taxation. But the principle laid down in the cases as to service is really conclusive against the proposition put forward. In answering the question whether a company resides in this country, which is a mixed question of law and fact, the place where it is incorporated forms no doubt one element for consideration; but all the circumstances must be considered. The question cannot depend on what the company chooses to call its head office. One must look at facts and not mere terms. I find in the present case that a clear majority of the directors reside in the United Kingdom, and all questions of policy appear to be dealt with by them in London. In considering where the brain, heart, and motive power of the company are situated, all the important elements in the case appear to me to show that they are to be found in London." These judgments were confirmed in the House of Lords, where it was said by Lord Loreburn L.C.<sup>2</sup>, "In applying the conception of residence to a company we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad."

It will have been observed that in several of the above decisions reference is made to the possibility that a company may reside in more than one place within the meaning of Schedule D: *i.e.* that it may have more than one principal residence. It should be pointed out that, in view of the principle adopted that the principal residence is at the centre of administrative business, in order to have two such residences it must

<sup>1</sup> At p. 642.

<sup>2</sup> At p. 458.

have two such centres, equal and independent, neither of more importance or authority than the other. It is not sufficient that the company should have two subsidiary residences, sufficient for purposes of jurisdiction, because the latter are not necessarily centres of administrative business. The dicta of Lord St Leonards in *Carron Co. v. McLaren*, for instance, to the effect that a company can have two domiciles for the purposes of jurisdiction are for that reason irrelevant in this connection. The cases in which a company can have two such co-ordinate centres of administrative business must be very rare: since bodies with two "brains, hearts, and motive powers" are ill adapted for common life.

The effect of the above decisions and dicta may be summarised as follows. The principal residence of a company, which is different from its subsidiary residences for the purposes of jurisdiction, is at its centre of administrative business, and not at the scene of its operations or necessarily in the country in which it was registered: but the latter circumstance is to be taken into consideration in determining the true centre of its administrative business. The constituting documents of the company are not conclusive as to the position of the true centre, which is a question of fact.

*The domicile and nationality of a corporation.*

12. English law has not concerned itself to lay down any express rule as to the nationality of corporations. The word implies duties and privileges, such as those of allegiance, which are rather political than juridical, and of which it may be doubted whether a corporation is capable<sup>1</sup>. The only sense in which a corporation can rightly be said to be English, is if it is subject to English law as to its constitution and internal relations; in other words, if English law is its personal law. But there is no definite principle or authority in our law

<sup>1</sup> In *Nabob of Arcot v. The East India Company* (1791), 3 Bro. C.C., at p. 303, it was said by Lord Thurlow L.C., "a fictitious body of subjects formed by a charter is as mere a subject as natural bodies in a state of subjection to the sovereign authority of the country. Therefore they are pure subjects, to all intents and purposes whatsoever." But the emphasis of this passage is that a corporation is not a sovereign. All the rights and duties of a corporation may be those of a natural subject: but it cannot have all the rights and duties of a natural subject. It may, however, be technically an enemy: see post, p. 2 8.



to tell us what corporations are English in this sense and what are not, and the lack of them is a misfortune, the cause of not a little uncertainty and confusion. The personal law of a natural person is determined according to our law by his domicile, or permanent home. If the application of the word can be extended by analogy to a corporation, it is no doubt most reasonable to say that its permanent home is at its principal residence, which, as has been seen, is the centre of its administrative business. We have, however, no definite authority for this proposition, nor any for the more important consequential proposition that in the case of corporations as in the case of natural persons, it is domicile that determines the personal law. If the domicile of a corporation is at the centre of its administrative business, and its personal law depends on its domicile, then a change of the centre of administrative business ought to result in a change of personal law. But we should look in vain for any authority for the proposition that a company registered under the Company Acts ceases to be controlled by those Acts when it removes its centre of administrative business out of the United Kingdom; or for the proposition that a company registered outside the United Kingdom becomes subject to those Acts when it establishes its centre of administrative business here<sup>1</sup>. On the contrary, there are, as has been seen<sup>2</sup>, express decisions to the effect that the Company Acts are not under any circumstances applicable to companies registered abroad; and in the case of Attorney General v. the Jewish Colonisation Association<sup>3</sup> we have a definite if not a conclusive authority for the proposition that the personal law of a company depends, not upon the place at which its centre of administrative business is situated, but upon the place at which it is registered. A foreigner domiciled in Austria gave certain securities to a company registered under the English Company Acts in trust after his death for the purpose of emigrating Russian Jews. The business of the company was transacted in accordance with its Articles of Association by a Council which met at the principal office of the

<sup>1</sup> In *Butt v. Monteaux* (1854), 1 K. & J., p. 98, it was argued that a French *société en commandite* must be treated as an English company because it was in fact managed in London and its connection with France was colourable only. The argument was not accepted: but it was countenanced by the appointment of an interim Receiver of the company's assets.

<sup>2</sup> Ante, p. 182.

<sup>3</sup> (1900) 2 Q.B., p. 556; s.c. (1901) 1 K.B., p. 123.

company which was in Paris: but the general meetings of the company, at which formal business only was transacted, were held at the registered office of the company in London. On the death of the donor it was held that the company was an English company: that recourse was necessary to English law to enforce the trust: and that therefore estate duty was payable under the Finance Act, 1894, and the Succession Duty Act, 1853, upon the total principal value of the trust fund. It was argued that the domicile of the company was French: but it was said in the court below by Ridley J.<sup>1</sup>, "on that view the domicile could be changed by a mere resolution to hold the meetings elsewhere and that does not seem reasonable"; and by Darling J.<sup>2</sup>, "I come to the conclusion that the Jewish Colonisation Association is domiciled in England." Their judgments were confirmed by the Court of Appeal. It was there said by Smith M.R.<sup>3</sup>, "that it is an English company I do not doubt, subject to English law, and the fact that there was a council of administration which carried on the business of the company outside of England does not render the company any less an English company and subject to English law." And by Stirling L.J.<sup>4</sup>, "being an English company it is necessarily under the jurisdiction of the English courts, and while it may acquire a foreign residence and domicile so as to be capable of being sued in a foreign country it must I apprehend be capable as long as it exists of being sued in the country of its origin." And the learned L.J. refers to the obligation imposed upon a company registered under the Company Acts by sections 39 and 62 of the Act of 1862<sup>5</sup> to keep a registered office here where service can be effected upon it, to show that such a company cannot cease to be English, *i.e.* lose its English domicile. From these dicta it appears that the personal law of a corporation in the case of a company registered under the Company Acts at least, is to be determined by the place of registration. It is not to be determined by the principal residence of the company, which is no other than its permanent home. Permanent home is the true meaning of the word domicile. The personal law of a company cannot therefore be said to be determined by its domicile, unless that word be used to mean in the case of a company something

<sup>1</sup> At p. 570.<sup>2</sup> At p. 572.<sup>3</sup> At p. 130.<sup>4</sup> At p. 144.<sup>5</sup> Now §§ 62 and 116 of the Companies (Consolidation) Act, 1908.

quite different from what it means in the case of a natural person, *i.e.* not its permanent home, but the place of its registration, which is analogous to the place of a natural person's birth. This artificial use of the word is apparently that intended in the above judgments of Ridley and Darling J.J.

Although there is no immediate conflict between this decision and those relating to the residence of a corporation, they are based upon different and irreconcilable premises. In the latter the legal theory that a corporation is unable to exist in person except within the sovereignty in which it came into existence is rejected, because the practical fact is that corporations do exist in person outside such sovereignty. But the theory is the basis of the decision in the case last mentioned: apart from it it is difficult to see any reason why an English registered company should not cease to be English if its permanent home is moved abroad; or even why a corporation incorporated by English charter or statute should not under the same circumstances suffer the same change. It is however vain to speculate whether our law might not, by the more complete rejection of the subtleties of the fiction theory, be rendered more consistent with itself and with the facts of practical life. It is clear law that, in English courts, once an English registered company always an English registered company; and we may say, though the matter has not been decided, that *a fortiori* once an English corporation always an English corporation, and vice versa, once a foreign corporation always a foreign corporation. We have in the case of the Attorney General v. the Jewish Colonisation Association an indication that according to our law a corporation has the personal law of the country under the laws of which it came into existence, and cannot change that characteristic by changing its centre of administrative business, which is its principal residence. Little more can be said with certainty upon the subject: and it is better to avoid altogether the use of the word domicile in the matter, except in the special sense of domicile for purposes of jurisdiction. Applied to registered companies it would have to mean the place of registration, and not the principal residence or permanent home: and its use would therefore be artificial and misleading.

In confirmation of the conclusions drawn above from Attorney General v. the Jewish Colonisation Association the following

dicta and decisions may be referred to. In the *Buenos Ayres &c. Railway Co. v. The Northern Railway Co. of Buenos Ayres*<sup>1</sup> it was said by Mellor J. of two companies registered under the Company Acts "both plaintiffs and defendants are in England; although they may be, as alleged, domiciled in the Argentine Republic, they are not aliens." In *Dreifontein Consolidated Gold Mines Limited v. Parson*<sup>2</sup> the plaintiff was a company incorporated in the South African Republic, whose shareholders were not subjects of that state. It had an office and a committee of management in London. It sued upon a policy made in London insuring gold which was seized by the South African Republic. It was held that the company was entitled to recover on the grounds that though it might have been technically an enemy it never was *de facto* an enemy. So also in *Nigel Gold Mining Company Ltd. v. Hoade*<sup>3</sup> it was held that a company registered in Natal which worked mines in the South African Republic could recover on a policy under similar circumstances on the grounds that though the company had a "commercial domicile," by which apparently was intended the scene of the company's operations in the South African Republic, yet it did not become an alien enemy on the outbreak of war unless it intended to continue business there after war broke out<sup>4</sup>. These cases are of interest in this connection in so far as they show that while the place of incorporation is considered to determine technically the national characteristics of a corporation<sup>5</sup>, yet the centre of its administrative business, and perhaps also in some cases the nationality of its shareholders and the scene of its operations, are treated as matters of importance, not wholly to be ignored in determining those characteristics.

There is however strong authority for the negative proposition that the nationality of the members of a corporation can have no effect on its national characteristics or personal law. A British Company is none the less British because its members

<sup>1</sup> (1877) 2 Q.B.D., p. 210.

<sup>2</sup> (1901) 2 K.B., p. 419.

<sup>3</sup> (1901) 2 K.B., p. 849: cp. *Robinson Gold Mining Co. v. Alliance Assurance Co.* (1901), 2 K.B., p. 919.

<sup>4</sup> per Mathew J. at p. 854.

<sup>5</sup> It was said by Romer L.J. at p. 437, "I shall assume that the company is to be treated as an ordinary subject of the S.A.R."

are foreign. This was decided in *Queen v. Arnaud and Powell*<sup>1</sup>. Section 12 of 8 and 9 Vict. c. 89<sup>2</sup> provided that foreigners might not be owners in whole or part of ships to be registered as British. The Custom House Officers refused to register a ship the property of the Pacific Navigation Company on the grounds that some of the members of the company were not British subjects, and that the ship was therefore partly owned by foreigners within the meaning of the statute. Mandamus was granted to compel registration: and Denman C.J. said<sup>3</sup> "the British company is as such the sole owner, and a British subject within the meaning of the 5th section as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares—we cannot notice any disqualification of an individual member which might disable him, if owner, from registering." The British quality of the company was treated in this case as depending upon the circumstance of its British charter. In the enactment which has now replaced the section which was then under consideration there is a notable proof of the modern tendency to attach more importance to the principal residence of a corporation, and less to the manner in which it came into existence. Section 1 of the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60) enacts that "a ship shall not be deemed to be a British ship unless owned wholly by—(d) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions." The privileges of a British corporation are thus denied to one which establishes its principal residence abroad.

That the nationality of its members has no effect upon the character of a corporation is also shown by the case of *The Princess of Reuss v. Bos and Others*<sup>4</sup> which decides that a company may be registered under the Company Acts although all the persons applying for registration are foreigners. It was said by Lord Cairns<sup>5</sup> of the subscribers that "those seven persons were foreigners, but that was no objection, because if in other respects foreigners comply with the regulations of the Act, it

<sup>1</sup> (1846) 9 Q.B., p. 806.

<sup>2</sup> Repealed and consolidated by § 18 of The Merchant Shipping Act, 1854: in its turn repealed by § 745 and replaced by § 1 of The Merchant Shipping Act, 1894.

<sup>3</sup> At p. 817.

<sup>4</sup> (1871) L.R. 5 H.L., p. 176.

<sup>5</sup> At p. 199.

appears to me they ought to have the benefit of the Act just in the same way that they could have benefited by the laws of this company by trading in this country." This case is also an authority for the negative proposition that the scene of a corporation's operations has no effect on its natural character or personal law; and that a British corporation is none the less British because its functions are discharged abroad. It was said by Hatherley L.C.<sup>1</sup>, "the mere fact of the principal business being abroad will not prevent any foreign merchants coming to this country and availing themselves of the Joint Stock Company Acts and carrying on business as a Joint Stock Company if they like": and by Lord Colonsay<sup>2</sup> "that the scene of its operations was to be in other countries is no objection to its being constituted here under the Act of Parliament." The actual decision in this case was that the company must be wound up, because it did not, within the meaning of s.s. 2 of § 79 of the Companies Act, 1862<sup>3</sup>, "commence its business within a year from its incorporation." This, and certain dicta to the effect that the registration of the company was only proper, because according to its articles it intended and had power to trade in the United Kingdom as well as abroad<sup>4</sup>, raised some doubt whether the business referred to in sub-section 2 of § 79 was not a business within the United Kingdom, and whether a company registered to carry on business abroad only, without power or intention to trade in the United Kingdom also, must not in every case be wound up at the expiration of a year, since it could not commence business within the meaning of the sub-section. That this is not so appears from the following cases. As early as 1850 it was said by Wigram V.C. that it was perfectly plain an English company might be formed the operations of which were to be carried on wholly abroad. Even this dictum he was however speaking of unincorporated companies. In the case of *in re Capital Fire Insurance Association*<sup>5</sup>, the case of *Princess of Reuss v. Bos* was

<sup>1</sup> At p. 195.

<sup>2</sup> At p. 196, cp. also E. P. Turner *in re The Madrid & Valencia Railway Co.* (1849), 3 De G. and S., p. 127; s.c. 2 and 9 Mac., p. 169.

<sup>3</sup> Now s.s. III. of § 129 of the Companies (Consolidation) Act, 1908.

<sup>4</sup> Cp. s.c. reported as *in re General Company for Promotion of Land Credit*, L.R. 5 Ch. App. per Giffard L.J. at p. 363.

<sup>5</sup> (1882) 21 Ch. D., p. 209; cp. *in re Tumacocori Mining Company* (1874), 17 L.R. Eq., p. 534, and *in re Factage Parisien Ltd.* (1864), 34 L.J. Ch., p. 140, where the business was carried on wholly abroad.

discussed and distinguished. It was held that the business referred to in the sub-section was not the administrative business, but the practical discharge of a company's operations; but that a company which was incorporated to carry on business in the United Kingdom and abroad, and which had commenced business abroad but not in the United Kingdom, ought not for that reason only to be wound up under sub-section 2. It was said by Chitty J.<sup>1</sup> for the purposes of illustration that if a company were incorporated for the purpose of working tramways say in Monte Video, and it were carrying on business in Monte Video, the headquarters of the administration being here in England, it could not be suggested that the company had not commenced its business simply because it was not working any tramway in England. It seems therefore certain that a British company can come into existence and continue to exist, though the scene of all its operations is abroad.

Scottish, Irish and Colonial corporations have different characteristics in respect of domicile and nationality from those of foreign corporations. It has been suggested that the status of Colonial corporations in this country is different from that of foreign corporations. "This company," said Phillimore J. in *De Beers Consolidated Mines Ltd. v. Howe*<sup>2</sup>, "owes its existence to its colonial incorporation, and the corporate existence of foreign corporate bodies is only recognised in other countries by comity. I doubt whether the same principle applies to colonial as to foreign corporations. Probably every corporation which has legal existence by virtue of an Act of the Sovereign power exercised in any part of his Majesty's dominions should be recognised as a Corporation in every Court of His Majesty's dominion." No final opinion was given on the point. It is of academic interest only; because it is quite certain that coming from the jurisdiction of courts independent of the English courts, and from territories to which the English Company Acts do not apply, and in which other laws prevail than those which govern English corporations, Colonial corporations are for all practical purposes on the same footing here as foreign corporations. To say that they are free from the necessity of the special implied recognition which is extended to foreign corporations out of comity serves only to exhibit the artificial and

<sup>1</sup> At p. 217.

<sup>2</sup> (1905) 2 K.B. at p. 630.

fictitious nature of the supposed necessity for such a recognition in the case of any corporation.

Registered companies commonly called Scottish or Irish might with more accuracy be called companies of the United Kingdom resident in Scotland or Ireland. It has been said by Jessel M.R.<sup>1</sup> that "the frame of the Act of 1862 shows that it relates to the whole of the United Kingdom," and in this connection he refers particularly to secs. 8 (2) and 81<sup>2</sup> which relate to the situation of the registered office and the jurisdiction in winding up respectively. The consequences of residence, or domicile, in one part of the United Kingdom rather than in another, is determined for registered companies by the Companies Acts and the rules of court, in the manner described elsewhere<sup>3</sup>. Since the constitution of all alike is governed by those acts, there can be no question as to what law is their personal law. Corporations created by charter or statute are in a different position, since it may be important to determine by the laws of which kingdom they are to be governed. In their case also as in that of foreign corporations we are met by the same doubt whether it is the domicile in the sense of the permanent home, or the circumstances of their incorporation, that is to decide. The doubt is greater in the case of a corporation incorporated by charter under the great seal of Scotland or Ireland, than in that of one incorporated by Act of the Imperial Parliament. In the latter case the circumstances of incorporation do not serve to connect the corporation more closely with one kingdom than another: and its domicile alone can determine the matter. It appears indeed from such dicta as there are to be found bearing upon the matter that this is the general rule applicable to all corporations of England, Scotland or Ireland. In *Palmer v. Caledonian Railway Company* it was said by Esher M.R.<sup>4</sup> of a company incorporated by Act of Parliament which discharged its functions in Scotland and England: "We cannot say it is two companies, which is in other words saying it is a company partly in Scotland and partly in England. In my opinion it is a Scottish company, with its governing body resident and domiciled in Scotland." *In re Burlands Trade*

<sup>1</sup> *In re International Pulp and Paper Company* (1876), 3 Ch. D., p. 594.

<sup>2</sup> Partly repealed and replaced by the Companies (Winding Up) Act, 1890.

<sup>3</sup> See post, p. 263.

<sup>4</sup> (1892) 1 Q.B. at p. 827.



Marks<sup>1</sup> it was said by Chitty J. "The defendants are a Scottish company registered under the Act of 1862 and with their head office in Scotland: consequently it may rightly be termed a domiciled Scottish corporation": but in this dictum there is nothing to show whether more importance is to be attached to the place of registration or to the head office, which is the centre of administrative business. Inadequate as such dicta are to serve as the basis for a rule, they indicate perhaps that a determining influence must be allowed to the domicile or permanent home in determining the kingdom in which a corporation is domestic: and this confirms the inference which would be drawn from the analogy of natural persons.

### **Statutory regulations affecting foreign companies.**

13. (1) *Every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom, shall within one month from the establishment of the place of business file with the registrar of companies:*

(a) *A certified copy of the charter, statutes, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;*

(b) *A list of the directors of the company;*

(c) *The names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process and any notices required to be served on the company;*

*and in the event of any alteration being made in any such instrument or in the directors or in the names or addresses of any such persons as aforesaid, the company shall within the prescribed time file with the registrar a notice of the alteration.*

(3) *Every company to which this section applies shall in every year file with the registrar such a statement in the form of a balance sheet as would, if it were a company formed and registered under this Act and having a share capital, be required under this Act to be included in the annual summary.*

<sup>1</sup> (1889) 41 Ch. D., p. 542; cp. *The Kilkenney & Great S. & W. Railway Co. v. Fielden* (1851), 6 Ex., p. 81.

(4) *Every company to which this section applies, and which uses the word "Limited" as part of its name shall:*

(a) *In every prospectus inviting subscriptions for its shares or debentures in the United Kingdom, state the country in which the company is incorporated; and*

(b) *Conspicuously exhibit on every place where it carries on business in the United Kingdom the name of the company and the country in which the company is incorporated; and*

(c) *Have the name of the company and of the country in which the company is incorporated mentioned in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company.*

(6) *For the purposes of this section the expression "certified" means certified in the prescribed manner to be a true copy or a correct translation; the expression place of business includes a share transfer or share registration office; the expression "director" includes any person occupying the position of director, by whatever name called; and the expression "prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.*

(7) *There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five shillings or such smaller fee as may be prescribed.*

These are s.s. 1, 3, 4, 6 and 7 of § 274 of the Companies (Consolidation) Act, 1908<sup>1</sup>, which with s.s. 2 and 5 (dealt with below) constitute the only provisions of our law dealing expressly with foreign companies in general. The history of the enactment is briefly as follows. Before 1906 opinion in business circles had long demanded that foreign companies should be subjected to some such regulation as to the matters dealt with in s.s. 1 (a) and (b), because it was thought that since they were not subject to the stringent provision of the Companies Acts, they enjoyed in their business operations an unfair advantage over domestic companies. Regulation was also desired as to the matters dealt with in s.s. 1 (c), because of the difficulty of effecting service upon foreign companies caused by rules of procedure. As long as the only foreign companies which carried

<sup>1</sup> Formerly § 35 of the Companies Act, 1907.

on business here were companies of good standing, whose foreign character was not formal only, but due to a substantial connection between them and some foreign country, their competition did not present itself to practical men as unfair, and no active demand was made for their regulation. The facilities which used to exist for the formation of companies in the United Kingdom were so great that there was no temptation for English promoters to register their companies abroad, and foreign promoters were actually attracted to this country. But with the increase in the severity of the English company laws, a practice had grown up of registering companies, which would formerly have been registered in the United Kingdom, in some place outside it, such as the Channel Islands, with which they had no substantial connection, because the conditions of registration were less onerous there, and the fees on registration and stamp duties on capital were less, or because the laws as to publicity and disclosure or as to the liability of directors were less onerous<sup>1</sup>. A company, for instance, with a capital of £200,000 could be registered on reconstruction in Guernsey for about £50, but in the United Kingdom the process cost more than £500. A certain amount of suspicion and jealousy was excited by these tramp companies: and it was felt to be specially unfair that they should be allowed to make use of the word limited in their title, and thus intentionally or unintentionally to pose as companies registered in the United Kingdom. It was considered that this word was commonly regarded as the hall mark of a company registered under the Companies Acts, and that companies were not entitled to use it which had not given proof of their solidity by discharging the onerous duties imposed by those Acts. In view of this state of affairs a Departmental Committee of the Board of Trade was appointed in 1906 to consider *inter alia* "the registration outside the United Kingdom of companies carrying on business in England and appealing to English investors." In reply to a question from the Committee, twenty-four Chambers of Commerce, including those of London, Birmingham and Manchester, and the Council of the Institute of Directors, recommended that the use of the word limited by foreign corporations should be restricted as it has been by s.s. (4) of the statute: and that other limitations should be imposed

<sup>1</sup> Report of the Company Law Amendment Committee, 1906 (Cd. 3052), § 18.

upon them as to the nature of which there was not the same unanimity. Their unanimous recommendation was adopted by the Committee and this, together with the Committee's recommendation that foreign companies should be compelled to file their constituting documents, list of directors, and annual balance sheet, and that they should appoint an agent for service, was embodied in the statute. It is noteworthy that the Committee expressed a definite opinion against further restrictions suggested by the Chambers of Commerce, such as requiring foreign companies carrying on business here to register, or to comply with any of the requirements of the Companies Act, 1900, as to prospectuses, or to make deposits here with a view to securing British creditors: and that they further advised that no expedients could with advantage be adopted for discouraging the registration abroad of companies which appeal to English investors, or conversely of encouraging the formation in the United Kingdom of companies which would in the ordinary course be registered abroad<sup>1</sup>. They were supported in this by a strong expression of opinion from the Council of the Incorporated Law Society that "as a rule the registration will be effected in the place most suitable for the purpose of the company, and any interference, even were it practicable, would be undesirable," and that the Council "does not advocate any interference with the liberty of foreign or colonial companies either to carry on business in this country or to appeal to English investors<sup>2</sup>."

*Sub-section 1. Incorporated company—business—  
place of business.*

14. The section applies to "every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom" (s.s. 1). The interpretation of the word "company" here presents little difficulty in the case of colonial companies and companies from the Channel Islands and the Isle of Man, which are constituted according to laws which bear a family resemblance to the English Company Acts. Nor is there likely to be any difficulty in deciding what American corporations are companies within the meaning of this

<sup>1</sup> Report of Company Law Amendment Committee, 1906, §§ 18 and 19.

<sup>2</sup> *Id.* p. 5.

section, since they also are incorporated according to the provisions of a law of corporations which is based upon the same principles as ours. But difficulties may present themselves in the case of companies which have come into existence in countries whose law of corporations is based on principles different from ours. In German law, for instance, the distinction between bodies corporate and not corporate is not so clearly drawn as in our own. In the law of France and of other countries there exist types of bodies corporate, such as the *société en nom collectif*, which have no close analogy amongst bodies corporate in our law. Doubts may therefore arise whether some particular foreign association or class of association is a "company" within the meaning of the section or not. To determine this, it is necessary in the first place to know what is meant by a "company." The Consolidation Act gives no general interpretation of the word applicable to its use in this connection, nor do any of the previous Company Acts do so. That of 1862 defines a joint stock company for the purposes of part 7 of the Act, but the companies here referred to are not qualified as joint stock. The word has, however, been judicially interpreted. In *Smith v. Anderson* it was said by James L.J. that "a company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in<sup>1</sup>." The section itself tells us more about the sort of association to which it is intended to apply. It is clear from s.s. 1 that only "incorporated" companies are included in the operation of the section. Indeed there is authority for the assertion that wherever the word company is used in a modern Act of Parliament an incorporated company is intended. In *Colquhoun v. Heddon*<sup>2</sup> it was said by Pollock B.: "the word company in itself denotes not a mere firm of persons which in a mercantile sense might be the same in whatever part of the

<sup>1</sup> (1880) 15 Ch. D. at p. 273; and see *St James' Club* (1852), 2 D.M. and G. p. 383.

<sup>2</sup> (1890) 24 Q.B.D., p. 497, s.c. C.A. 25 Q.B.D., p. 129. It may be observed that a foreign company is not a company within the meaning of s. 192 of the Companies (Consolidation) Act, 1908; cp. *Thomas v. United Butter Companies of France* (1909), 2 Ch., p. 484.

world it was established,—but an entity and a legal entity, the validity and effect of which must depend upon the laws of the country within which that company is established.” Here again the word “incorporated,” which presents no difficulty in the case of colonial or American companies, may give rise to doubts in connection with companies which came into existence in countries where the distinction between the corporate and non-corporate character is not so clearly drawn as it is in our own<sup>1</sup>. According to the law of some countries, the right to sue and the liability to be sued in the firm name constitutes a firm a juristic person “in forma,” although it has no other status or capacities as a person distinct from its members, and so is not a juristic person in substance. A firm with formal juristic personality of this sort is, it is submitted, not “incorporated” within the meaning of this section. The essence of incorporation according to English law is the bringing into existence of an entity with status as a person and capacities distinct from those of its members: and only a foreign company which is incorporated in the latter sense, and is a legal person distinct from the aggregate of its shareholders and capable of being the subject of rights and liabilities can be said to be so “incorporated.”

Again, it is clear from s.s. (1), (4*b*) and (6) that the section applies to those companies only which have a “place of business” here. It is noteworthy that there is here no qualification like that in § 1 sub-sec. 2 of the Act that only that sort of business is intended which has for its object the acquisition of gain. Without that qualification “the word business” it was said by Brett L.J. in *Smith v. Anderson* “might in a grammatical sense include things which no ordinary person would call a business<sup>2</sup>.” It has a more extensive meaning than “trade<sup>3</sup>.” Johnson’s Dictionary, quoted by Esher M.R. in *Smith v. Anderson*<sup>4</sup> defines it as “employment, transaction of affairs.” But in *Rolls v. Mills*<sup>5</sup>, a case concerning the breach of a covenant not to carry on a “business,” Lindley L.J. found that the dictionaries did not throw much light on the meaning of the word. “The word,” he

<sup>1</sup> Cp. *Newby v. Von Oppen* (*sup.*) per Blackburn J. at p. 293.

<sup>2</sup> *Smith v. Anderson* (1881), 50 L.J. Ch. at p. 52.

<sup>3</sup> *Harris v. Amery* (1865), L.R. 1 C.P., p. 148.

<sup>4</sup> (*sup.*) at p. 43.

<sup>5</sup> (1883) 27 Ch. D. at p. 88; also (1884) 25 Ch. D., p. 206; see also *Bramwell v. Lacy* (1879), 10 Ch. D., p. 691.

said, "means almost anything which is an occupation as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business"; and it was held that keeping a charity club for girls was carrying on a business. It appears that there may be a business in the ordinary meaning of the word without a pecuniary profit, and there is no reason to suppose that the word is used in this section with any other meaning than its ordinary one. It seems therefore that the section applies to a foreign corporation which has a business in the sense of an occupation even though it is not a commercial undertaking and its business is without pecuniary profit. Such companies are however very exceptional: and for the most part it is commercial undertakings which are affected by the section.

It appears therefore that a "company" within the meaning of the section (*a*) is an association so constituted that whilst its members change, the association continues, (*b*) must be "incorporated," in the sense that the company itself is an entity distinct from the aggregate of its members, having status as a person, and capable of acting as the subject of legal rights and liabilities, and (*c*) whilst it need not be a commercial undertaking or have for its object the acquisition of gain, it must have a business, in the sense of an occupation.

The section applies to those foreign companies only which establish in the United Kingdom a "place of business." This raises the question, what is a place of business? As a term of art, requiring interpretation, the phrase is applied to foreign companies for the first time in this Act. The Act itself provides us with no definition of the term. Sub-section 6 indeed tells us that a share transfer or share registration office is to be deemed to be a place of business within the meaning of the section, and thereby removes all possibility of doubt in certain cases from which doubts might otherwise have arisen. But the language of that sub-section makes it clear that it is not intended to supply even a partial definition. Nor had the circumstances necessary to constitute a place of business in the case of a foreign company been, before the passing of this Act, a matter directly at issue in any reported decision. The courts had often been concerned to inquire under what circumstances a foreign corporation can be said to be "present" in this country, so that service may be effected upon it, or "resident" here, so that the court may

exercise jurisdiction over it in winding up, or the state tax its income under the first paragraph of Schedule D of the Income Tax Act, 1853. In these inquiries the question whether the foreign corporation in question had a "place of business" here had not been directly raised. The courts however held that a foreign corporation is "present" and "resident" wherever it has a place of business; and the question whether it had a place of business in this country was therefore necessarily, though indirectly, involved in their decisions.

Before we consider the information which these decisions give as to the nature of a place of business it should perhaps be pointed out that a foreign company may carry on business in this country without having a place of business here: "it may be one thing," it has been said, "to carry on business within the jurisdiction and another to have a place of business within the jurisdiction<sup>1</sup>." In the former case it is free from the obligations imposed by the section. Not every foreign company that is liable to income tax for instance is bound by the section under discussion. Under the second paragraph of Schedule D of the Income Tax Act, 1853 (16 and 17 Vict. c. 34), liability for income tax attaches to those foreign companies by whom any profession, trade, employment, or vocation is exercised within the United Kingdom, although they are not resident there. The obligations created by the section under discussion attach to those foreign companies only which have a place of business. Decisions, therefore, as to the liability of foreign companies to income tax under paragraph 2 of Schedule D of the Act of 1853 cast no light on their liability to perform the obligations created by this section. On the other hand light is cast upon the question by decisions as to their liability for income tax under paragraph 1 of Schedule D, which taxes the incomes of persons residing within the United Kingdom and by decisions as to their liability to service under the old practice governed by Order 9 rule 8 of the Rules of the Supreme Court, and as to their liability to be wound up under the Companies Acts. The question at issue in these matters is the presence or residence of the foreign company, and, as it will be seen, it has been repeatedly said that it is present or resident

<sup>1</sup> per Esher M.R. in *Worcester City & County Banking Co. v. Firbank, Pauling & Co.* (1894), 1 Q.B.D. at p. 788.



wherever it has a place of business, and nowhere else. Whether or not a foreign company has a place of business within the United Kingdom is a question of fact, but the cases in question establish the following principles as to the manner in which facts are to be interpreted. The true test is whether the foreign company is "conducting its own business at some fixed place<sup>1</sup>." The business conducted at the fixed place must be the business of the company itself, and not the business of an agent of the company: it must be conducted by "some person who there carried on the company's business as their representative and not merely his own independent business<sup>2</sup>." The mere fact that a foreign company had an agent in this country<sup>3</sup>, or possessed property here<sup>4</sup>, was not sufficient to enable it to be sued by means of service of the writ on that agent before the passage of this Act: it will therefore be insufficient to render a foreign company liable to perform the obligations imposed by this section, since both depend on the same test of liability, whether the company possesses a place of business of its own (at which it is present). The business of a foreign company may in a popular sense be said to be carried on at the place of business of its agent: but that is not so in the eye of the law<sup>5</sup>. In order that the business which is carried on at a place of business may be legally the business of the company, and not the business of an agent, it must be conducted by some person who is not a mere *agent*, but the officer or *servant* of the company. "No doubt in one sense," as it has been said by Channell J.<sup>7</sup>, "all companies must act by agents, but there is a distinction between officers of the company who directly represent the company, and firms who act merely as agents for the company": for so far as the company has a corporeal existence, the former are the company.

<sup>1</sup> *Dunlop Pneumatic Tyre Co. Ltd. v. Actiengesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (1902), W.N. 8 and (1902), 1 K.B. 342, per Collins M.R. at p. 346.

<sup>2</sup> Same case per Romer L.J. at p. 349.

<sup>3</sup> *Walter Nutter & Co. v. Messageries Maritimes de France* (1885), 5, 9 L.J., Q.B. 527.

<sup>4</sup> *Badcock v. Cumberland Gap Park Co.*, 93 1 Ch. per Stirling J. at p. 366.

<sup>5</sup> *The Princess Clementine* (1897), P., p. 18, per Gorell Barnes J. at p. 21.

<sup>6</sup> *Baillie v. Goodwin* (1886), 33 Ch. D. 604 following *Corbett v. General Steam Navigation Company* (1859), 4 H. & N. 482.

<sup>7</sup> *Goerz v. Bell* (1904), 2 K.B. at p. 148.

The following cases illustrate the application of these principles. In *The Carron Iron Co. Proprietors v. MacLaren*<sup>1</sup> a Scotch company with its factory and chief office in Scotland traded in England, and had warehouses and assets and agents for sale in various places here. It was held that service of notice of motion for an injunction on such an agent in London was bad, because the company could not be said to be resident here, or represented for the purpose of service in this case by the agent for sale. Lord St Leonards, dissenting, held that the service was good, explaining that "there is no jurisdiction here because the *agent* is resident here. The jurisdiction if it exists is because the appellants are here by their houses of business and their agents, just as they are in Scotland. It is not a question of attacking the agent as agent." In *Corbett v. General Steam Navigation Co.*<sup>2</sup> a company carrying on business in London, which employed in a country town a general commission agent who transacted the company's business there, in an office for which the company paid him rent, was held not to carry on business in the country town within the meaning of the County Courts Act, 9 and 10 Vict. c. 95, s. 128: because the general commission agents were not its servants. In *Newby v. Von Oppen and the Colts Patent Firearms Manufacturing Company*<sup>3</sup>, the defendant company whose head office was in the United States of America carried on business at a place of business in England. Service of a writ on the manager of the English branch was held good, although, it was said, it would not have been so, if the foreign company had merely employed an agent here who made a contract for them<sup>4</sup>. In *Walter Nutter v. Messageries Maritimes de France*<sup>5</sup> the defendant company had head offices in France and agents and correspondents in London and elsewhere. Service of writ on the London agent was held bad because *inter alia* the business carried on by the agent was his own, and not that of the company. In *Lhoneux Limon & Co. v. Hong Kong & Shanghai Banking Corporation*<sup>7</sup>, a foreign banking company had a London

<sup>1</sup> (1855) 5 H.L.C. 416 reported as *MacLaren v. Stainton* (1852), 16 Beav. 279.

<sup>2</sup> At p. 458. <sup>3</sup> (1859) 4 H. & N., p. 482. <sup>4</sup> (1872) L.R. 7 Q.B. 293.

<sup>5</sup> per Blackburn J. at p. 295, see also *Mackereth v. The Glasgow & South Western Railway Co.* (1873), L.R. 8 Ex. per Cleasby B. at p. 152.

<sup>6</sup> (1885) 34 L.J. Q.B., p. 527.

<sup>7</sup> (1886) 33 Ch. D. 446.

"agency," which was in fact a bank, with the usual offices, managers, and staff of clerks. Service of a writ on the head officer of the agency was held good, because, although the defendant company was prohibited by a colonial ordinance from establishing a branch in England, and might establish an agency only, yet in fact "the defendants carry on business in London. They hire an office, write up their name, and beyond all question stamp upon themselves and their place of business here the assumption that here they carry on their business<sup>1</sup>." In *The Princess Clementine*<sup>2</sup> the defendants were a foreign company which ran steamers from Tilbury to Ostend. They had their name on the door of an agent's office in London and issued advertisements directing the public to apply there. The rent of the office was paid by the agent, and the clerk and manager there were his servants. It was held that service on the managing clerk at the London office was not good service on the company, because the business carried on there was not the business of the company nor was the managing clerk the company's servant. The defendants however were deprived of costs, on the grounds that they had held themselves out as having an office in London. In *La Compagnie Générale Transatlantique v. T. Law & Co.*<sup>3</sup> the appellants were a French company with their head office in Paris. They owned steamships running between French and English ports, and had an office in London, with their name painted up; and one at Liverpool, where an agent acted for them but carried on also an independent business of his own. A writ was served on the Liverpool agent, and this service was held good as against the company. In the court of first instance<sup>4</sup> it was said by Jeune P.<sup>5</sup>, "the company, in the only way it can, by the hand of a representative, makes contracts and earns profits in England; and that presents the fact of a company carrying on business in England as a matter of law and of common sense." His judgment was affirmed by the Court of Appeal and by the House of Lords, on the grounds that the foreign company was actually carrying on business in this country at a fixed place, and was therefore resident here<sup>6</sup>. In the *Dunlop Pneumatic Tyre Co.*

<sup>1</sup> per Bacon V.C. at p. 448.

<sup>2</sup> (1897) P., p. 18.

<sup>3</sup> (1899) A.C., p. 431.

<sup>4</sup> *La Bourgogne* (1899) P., p. 1.

<sup>5</sup> At p. 5.

<sup>6</sup> per Collins L. (1899) P. at p. 16 and per Halsbury L.C. (1899), A.C. at p. 433.

Ltd. v. Actiengesellschaft für Motor etc., vorm. Cudell & Co.<sup>1</sup> the defendants, a German company, held a stand at an exhibition for nine days, and exhibited certain articles there, which were alleged to infringe the plaintiff's patent. The stand was in charge of a representative of the company, who exhibited the articles and took orders. Service of a writ on this representative was held good service on the company on the grounds that the company was carrying on its own business at the stand. It was admitted that the short length of time for which the business was carried on was a difficulty. 'Duration of time, it was said, is an element to be considered in determining whether a foreign company can be said to have a place of business at which it is resident. But the mere fact that the business is carried on for a limited period does not prevent the company from being considered as responsible within the jurisdiction for that period<sup>2</sup>.

The conditions which must be fulfilled in order that a foreign company may be said to have a place of business in this country at which it is itself present are lucidly summarised in this case by Romer L.J. thus :—"if for a substantial period of time (here nine days) business is carried on by a foreign company at a fixed place of business in this country, through some person who there carries on the company's business as their representative, and not merely his own independent business<sup>3</sup>." In order that a foreign company may be said to have a place of business within the meaning of the section under discussion the same conditions must no doubt be fulfilled.

In Actiesselskabet Damskib "Hercules" v. The Grand Trunk Pacific Railway Company<sup>4</sup> the court dealt with a case of common occurrence. A Canadian corporation had an advisory board of directors which met at a fixed office in London for which no rent was paid, but the only business which the board transacted was the financial business of issuing loans. It was decided that the board was carrying on the business of the company, and that the office was the company's office. The company was accordingly resident within the jurisdiction, and service of a writ of summons was allowed on the secretary of the London board.

<sup>1</sup> (1902) 1 K.B. 342 and (1902) W.N., p. 8.

<sup>2</sup> See Collins M.R. at p. 346.

<sup>3</sup> At p. 348; see also *Badcock v. Cumberland Gap Park Co.* (1892), 931 Ch., p. 362.

<sup>4</sup> Reported in the *Times* newspaper, 1911, Nov. 1st: and see also *Saccharin Corporation v. Chemische Fabrik von Heyden* (1911), 2 K.B., p. 516.

Some further authority as to when a foreign company can be said to have a place of business in this country may be found in cases concerning the jurisdiction of the court to wind up foreign companies under § 199 of the Companies Act of 1862<sup>1</sup>. *In re Commercial Bank of India*<sup>2</sup> it was held by Romilly M.R. that the Court of Chancery had jurisdiction to wind up an Indian joint stock company, which had its principal place of business in India, but an agent and a branch office in England. *In re Lloyd Generale Italiano*<sup>3</sup> it was held on the other hand that there is no jurisdiction under the Companies Acts to wind up a foreign company which has carried on business in England by means of agents, but which has no branch office, or residence, of its own here. In these cases also as in those relating to service, we have a distinction drawn between foreign companies which carry on business here by means of agents only, and those which carry on business here *in propria persona*, at a place of business, or what is perhaps the same thing, a branch office. The latter only were liable to service under the old practice, and to be wound up, and it is the latter only which will be liable to perform the obligations imposed by this section.

Finally in this connection it may be observed that the phrase "place of business" has been judicially interpreted in another connection. Order 48 (a) r. 3 of the Rules of the Supreme Court provides *inter alia* that where persons are sued as partners in the name of their firm, the writ may be served at the principal place within the jurisdiction of the business of the partnership. In *Grant v. Anderson & Co.*<sup>4</sup> the defendants, who were a firm of manufacturers carrying on business and resident in Glasgow, employed an agent to procure orders for them on commission in London. He occupied an office in London for this purpose, the rent for which he paid himself, whence he transmitted orders to the defendants. He had no authority to conclude contracts himself for the defendants. Under these circumstances, it was held that the defendants did not carry on business and had no place of business within the jurisdiction, and that service on the agent was not good service on the firm within the rule. The grounds of the decision

<sup>1</sup> Now §§ 267, 268 of the Companies (Consolidation) Act, 1908.

<sup>2</sup> (1868) L.R. 6 Eq., p. 517.

<sup>3</sup> (1885) 29 Ch. D. 219.

<sup>4</sup> (1892) 1 Q.B., p. 108.

are similar to those of the decisions referred to above: that the office was not the office of the defendants, but of the agent only<sup>1</sup>.

*Sub-section 1 b. Directors.*

15. The requirements of sub-section 1 *b* may perhaps give some difficulty to companies incorporated under legal systems differing from our own, since doubts may arise as to which of the officers and managers of the company are directors within the meaning of the sub-section. The explanation of the word supplied by sub-section 6<sup>2</sup> is less a definition than an admonition to regard substance in the matter rather than form. According to § 3 of the statute 7 & 8 Vict. c. 110 (repealed by § 205 of the Companies Act 1862) the word Director means the person having the direction, conduct, management, or superintendence of the affairs of the company. There is no subsequent statutory definition which casts much light on the matter. In substance a director is a person selected to manage the affairs of a company for the benefit of the shareholders<sup>3</sup>, who acts as an agent for the company in the transactions which he enters into on behalf of the company<sup>4</sup> and as a quasi-trustee of the company's money and property under his control on behalf of the shareholders<sup>5</sup>. It is suggested that those officers of a foreign company are directors within the meaning of the sub-section who possess substantially the same capacities as those of manager, agent, and quasi-trustee, which the directors of a company possess according to our company laws.

*Sub-section 1. Registrar.*

16. The registrar referred to in sub-section (1) and elsewhere is the Registrar of Joint Stock Companies, appointed under §§ 15, 243, and 289 of the Act<sup>6</sup>. Notices of alterations are to be filed within such times as may be prescribed. The proceedings of the Board of Trade in making an order for this purpose, and their proof, are controlled by § 236 of the Act<sup>7</sup>.

<sup>1</sup> per Esher, M.R. at p. 116.

<sup>2</sup> And again by § 285, formerly § 30 of the Companies Act, 1900; cp. § 3 of Companies Clauses Act, 1845 (8 & 9 Vict. c. 16).

<sup>3</sup> York & Railway Co. v. Hudson (1853), 16 Beav., p. 485.

<sup>4</sup> Ferguson v. Wilson (1866), 2 Ch., p. 77.

<sup>5</sup> G.E. Railway Co. v. Turner (1872), 8 Ch., p. 149, and *in re* Lands Allotment Co. (1894), 1 Ch., p. 616.

<sup>6</sup> Formerly § 174 of the Companies Act of 1862.

<sup>7</sup> Formerly § 30 s.s. (3) of the Companies (Winding up) Act, 1890.

*Sub-section 3. Statement of affairs—private company.*

17. The statement of affairs which companies formed and registered under the Act and having a share capital are required under the Act to include in the annual summary is that required by § 26 sub-section (3) of the Act<sup>1</sup>, which provides that:

“The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance sheet need not include a statement of profit and loss.”

The exception in favour of private companies gives rise to some doubts in connection with foreign companies. Section 121 s.s. (1) of the Act<sup>2</sup> defines a private company thus:

“For the purposes of this Act the expression ‘private company’ means a company which by its articles

(a) restricts the right to transfer its shares; and

(b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.”

Does a foreign company which answers to this description escape the obligation to file a statement of its affairs in virtue of the proviso? There is nothing in the definition to exclude foreign companies from its scope. Certain other provisions of the Act relating to private companies, the following sub-section (2) of § 121 regulating the alteration of a private into a public company, and § 2 of the Act, reducing the minimum of seven members required by the Act to two only in the case of private companies, are indeed applicable only to companies registered under the Act, but that circumstance has no relevance to show that foreign companies are not included in the preliminary and general definition of sub-section (1) of § 121. The distinction between the public and private character made by the Act is a distinction

<sup>1</sup> Formerly § 21 of the Companies Act, 1907.

<sup>2</sup> Formerly § 37 s.s. (1) of the Companies Act, 1907.

between characteristics inherent in the constitution of a company, not between formal characteristics due to registration under our Companies Act. It is applicable to all companies alike, under whatever laws they may have obtained registration. It seems therefore proper to conclude, in the absence of any express declaration to the contrary, that the distinction made by the Act must be considered to apply to all companies alike, and not only to companies registered under the Companies Act. It appears that a foreign company can be a private company within the meaning of the Act: and it follows that if it has that character it need not file a statement of its affairs. It need only do so if it would have been required to do so by § 26 sub-section (3) of the Act, were it a company formed and registered under the Act and having a share capital. But were it such a company it would not have been required to do so by that section, since by reason of its private character it would have been exempted.

*Sub-section 4. Country of incorporation.*

18. A company to which the section applies and which uses the word "Limited" as part of its name is required under the circumstances described to state the country in which it is incorporated. It has been seen in the first part of this work that the circumstances under which some companies are incorporated may make it difficult for them to decide in which of several countries they are incorporated<sup>1</sup>. A company for instance, may obtain capital by subscription in countries A and B, draw up the instrument constituting or defining its constitution in or according to the forms provided by the laws of country C, and perform the formalities of registration in country D. In that case in which of those four countries is it "incorporated"? To determine this, it must first be determined what law is to govern the determination, English law, or the personal law of the company: and there can be no doubt that it must be governed by English law. It is indeed the personal law of the company that decides whether the company is incorporated or not. But the more fundamental question of where the company is incorporated, or in other words in what country it is domestic, this is a matter for the territorial law. Indeed it would be impossible to refer the matter to the personal law of the company.

<sup>1</sup> Ante, p. 127.



To do so would be to refer it in a vicious circle: for in order to decide what law is its personal law we must know in what state it was incorporated.

But unfortunately English law provides no general principle by means of which it can be determined in what country a company is incorporated. As has been seen, there is little or no authority from which any doctrine of English law can be deduced as to the circumstances which must be considered in determining the nationality of a company. The most that can be said is that in decisions pronounced *alio intuitu* there are dicta which indicate a tendency to consider the place of registration as the most important circumstance to be considered in this connection.

#### *Sub-section 6. Certification.*

19. "Certified," it is said, "means certified in the prescribed manner to be a true copy of a correct translation." The manner prescribed for the certification of a copy by the common law is that it should be certified as true by the officer who has custody of the original<sup>1</sup>.

The remainder of this sub-section has been dealt with under sub-section (1).

*If any company, to which [section 274 of the Companies (Consolidation) Act, 1908] applies, fails to comply with any of the requirements of that section the company, and every officer or agent of the company, shall be liable to a fine not exceeding fifty pounds, or, in the case of a continuing offence, five pounds for every day during which the default continues.*

20. This is sub-section 5 of section 274 of the Companies (Consolidation) Act, 1908<sup>2</sup>. It is more convenient to deal with it before dealing with the requirements of that section relating to service of process: but the penalties which it inflicts apply as well to failures to comply with the requirements of the section relating to service of process as to failures to comply with those of its requirements which are dealt with above.

"Every officer or agent of the company" is liable to the prescribed penalties. These words need some reasonable

<sup>1</sup> Law of Evidence, Phipson (1902), p. 483; Taylor, § 1599; Roscoe's *Visi Prius*, 99.

<sup>2</sup> Formerly § 35 s.s. (5) of the Companies Act, 1907.

limitation<sup>1</sup>. Interpreted literally, they would render a subordinate clerk or office boy, who is in a sense an agent of the company, liable for the penalties. The most reasonable limitation to be placed upon them is that those persons only are officers and agents within the meaning of the sub-section who have or ought to have authority to see that the requirements of the section are fulfilled, and are or ought to be responsible to the company for their fulfilment. Upon this view it may be suggested that only those officers are liable to the penalties who are in the nature of head officers, as explained by the decisions referred to hereafter in connection with the law of service. It is difficult to attribute any effect to the word "agents," in addition or in the alternative to the word officer. If, as seems to be the case, it was intended to widen the application of the latter word, a more inappropriate term could scarcely have been chosen for the purpose. A company which is represented here by an agent only, as distinguished from an officer, manager or servant, is not within the purview of the section at all; because it does not itself carry on business here. To inflict penalties therefore upon an agent for failing to fulfil the requirements of the section is to inflict them upon one who has *ex hypothesi* no requirements to fulfil under the section.

As to the recovery of penalties, § 276 sub-section (1) of the Act<sup>2</sup> provides that "all offences under this Act made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts." These are the Summary Jurisdiction Act, 1848, and the Summary Jurisdiction Act, 1879<sup>3</sup>. They give power to issue distress for penalty, and of commitment, in the first instance or in default of distress (§§ 19—25 of the Act of 1848: and § 21 of the Act of 1879).

It will be observed that the Act makes no express provision

<sup>1</sup> Who are "officers" of a company has been considered in decisions upon the meaning of § 165 of the Companies Act, 1862, and the substituted § 10 of the Companies Winding Up Act, 1890 (now § 215 of the Consolidation Act), giving power to the Court to assess damages against delinquent directors, officers and promoters. The difference in the subject-matter of the sections renders, however, such decisions irrelevant for the purpose of interpreting the section under discussion. It has been held, for instance, that an auditor is an officer within section 10 of the Act of 1890. *In re Kingston Cotton Mill Company* (1895), 1 Ch., p. 6. He could scarcely be considered an officer within the present section.

<sup>2</sup> Formerly § 49 of the Companies Act, 1907.

<sup>3</sup> Interpretation Act, 1889, § 13 (7).

as to the effect upon the status and capacities of a foreign corporation of failure to comply with its requirements. There must in consequence be some doubt as to what the effect would be: and in particular there is at least something to be said in favour of each of the following opinions. There is as yet no reported decision of our courts to tell us which of them is correct: although it may safely be prophesied that it is only a question of time before an authority is provided. The point has however been much debated in connection with very similar statutes in the United States: and we have the good fortune to be able to refer to the decisions of many eminent American judges to elucidate the matter.

(A) It may be said that the requirements of § 274 of the Act are conditions precedent to the right of a foreign corporation to claim recognition as a juristic person, the subject of rights: and that as long as those conditions remain unperformed, it has no personal status: that it is in fact outlawed, so that it is incapable of performing any acts in the law, or of having or vindicating any rights. A contract made by a foreign corporation under the circumstances would according to this opinion be totally void. In favour of this view those cases might be referred to in which it has been decided that an association of more than twenty members which has not complied with the requirements of the Companies Acts by obtaining registration has no personal status, and cannot sue or be sued upon its contracts<sup>1</sup>. There is however no true analogy between the cases. Such an association has never become possessed of personal status: whereas a foreign corporation *prima facie* has personal status in this country of which it ought not to be deprived except by express words. The theoretical arguments in favour of the opinion are developed in certain decisions of the State Courts in America concerning similar statutes especially those of Oregon<sup>2</sup>, Alabama<sup>3</sup>, Indiana, Illinois, and Wisconsin<sup>4</sup>. A

<sup>1</sup> Shaw v. Benson, 11 Q.B.D., p. 563; *in re* Padstow Association (1882), 20 Ch. D., p. 137.

<sup>2</sup> Simple v. Bank of British Columbia (1878), 5 Sawyer, p. 88.

<sup>3</sup> Christian v. American F. L. & Mortgage Company, 89 Ala., p. 198 and cases there cited; but see American L. & T. Company v. East & West Railway Co. (1889), 37 Fed. Rep., p. 242, where the Federal Court differed from the Alabama Courts.

<sup>4</sup> Toledo T. & L. Co. v. Thomas (1890), 33 W. Va., p. 566. In Vermont and Oregon, where the similar statutes imposed no penalty, it was held that the foreign corporation's contracts were void, since otherwise the statutes might be evaded with impunity. (*Id.*)

corporation, it is there said, has no existence beyond the limits of the sovereignty which created it. It has no power to make a contract within another state without its permission. Such a statute imposes a condition on the permission. It follows from these premises that a foreign corporation has no power to contract in the state until it has complied with the terms upon which the permission is granted<sup>1</sup>. It is clear that this argument is based upon the assumption that the requirements of the statutes are intended by the state as terms, that is conditions precedent, upon which the permission is to be granted. There is nothing in the wording of § 35 to give rise to such a presumption. The strongest reason however against this opinion is that it would militate against the obvious policy of the Act. Section 35 is clearly intended to protect the members of the public who enter into legal relations with a foreign company. To deprive foreign corporations under the circumstances of personal status and thus totally to invalidate their contracts would be to inflict injury on the public, for a foreign company would then be able to take advantage of its own breach of the statute to escape from its obligations, by pleading its incompetence as a defence in an action. It may be said that this would be obviously inequitable and absurd. That it is so has been recognised in America, where the better opinion is that a foreign corporation is estopped from pleading in defence its own breach of the law<sup>2</sup>.

(B) Secondly, it must be said that the requirements of the section are not conditions precedent to the right of recognition, so that a foreign corporation which had not fulfilled them would have personal status and the ordinary capacities: but that the effect of the imposition of a penalty for failing to fulfil the requirements is implicitly to prohibit the carrying on of business before those requirements are fulfilled: and that the carrying on of business being prohibited, all contracts and other acts in the law performed with that object are affected with illegality, so as to be, not void indeed, but voidable at the option of the other party. In the result a foreign corporation under the circumstances would be capable of incurring obligations, but incapable

<sup>1</sup> *In re Comstock* (1874), 3 Sawyer, p. 218; cp. also *Telluride, P.T. Co. v. Rio Grande W. Railway Co.* (1902), 187 U.S., p. 569.

<sup>2</sup> Cp. *Ehrman v. Teutonic Insurance Co.*, 1 McCrary, p. 123; *Hagerman v. Empire State Co.*, 97 Pa. St., p. 534; *Bischoff v. Automobile Touring Co.* (1904), 97 Ap. Div. N.Y., p. 17; *in re Naylor Manufacturing Co.* (1905), 135 Fed. Rep., p. 206; *sed con. in re Comstock (sup.)*.

of enjoying rights. Again, it might be said that the illegality is of lesser order, so that the foreign corporation would be capable under the circumstances of both rights and obligations, but would be prevented from enforcing the former until it had complied with the law. Its contracts for instance would not be void or voidable, but all remedies upon them would be suspended until the requirements of the section had been fulfilled.

The application of these opinions would not at any rate result in rendering this statute, passed for the benefit of the public, a danger to public and private interests. In support of them the general principle may be referred to, that when a statute goes no further than to impose a penalty for the doing of an act, contracts made in breach of the statute, although not expressly prohibited, are void<sup>1</sup>. An example of a case of the application of that principle which has some features analogous to those of the circumstances under discussion is that of *Foster v. Taylor*<sup>2</sup>. There an action was brought for the price of firkins of butter which were not marked in accordance with the statute 36 G. III. c. 88 § 2 (since repealed): and it was held that although the statute imposed a penalty, yet the defendant's remedy was not limited to proceeding for the penalty, but that the clause might be pleaded in defence to the action: and that the clause, being intended for the benefit of the public, indirectly prohibited any sale of butter in vessels not properly marked, so that the action must fail. In the same manner, it might be said, § 274 of the statute under discussion, in making certain requirements, indirectly prohibits the carrying on of business unless the requirements have been fulfilled; the penalties are not the only remedy, but the section being intended for the benefit of the public may be pleaded in defence by one who has entered into legal relations with a foreign company under the circumstances.

This contention would, it is suggested, be misconceived. A prohibitory statute, it has been said<sup>3</sup>, must not be interpreted

<sup>1</sup> *Cp. Dudley v. Collier* (1888), 87 Ala., p. 43, s.c. 13 Am. St. Rep., p. 55.

<sup>2</sup> (1834) 5 B. & Ad., p. 887; comp. also *Gordon v. Howden* (1845), 12 A. & E., p. 243; *Smith v. Lindo* (1858), 4 C.B. N.S., p. 395, and 5 id. p. 587; *Stevens v. Gourley* (1859), 7 C.B. N.S., p. 99.

<sup>3</sup> *Philpot v. President and Governors of St George's Hospital* (1857), 6 H.L.C. at p. 349; cp. also *Brown v. Duncan* (1829), 10 B. & C., p. 93; *Smith v. Mawhood* (1845), 14 M. & W., p. 452.

in a spirit of tendency ; if any thing done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited. But if the simple meaning of § 274 be considered, it does not prohibit the carrying on of business until its requirements are fulfilled. Penalties are imposed upon the failure to fulfil them, but no penalties are imposed upon carrying on business before they are fulfilled. It is not even declared that business is not to be carried on before they are fulfilled. The obvious inference is that the only thing prohibited substantially or otherwise, if the matter may be put thus negatively, is failure to fulfil the requirements, and that carrying on business without fulfilling them is not the thing prohibited at all. The same result follows from a consideration of the substance of the requirements. These are not of a preliminary sort, such as the necessity for making a deposit on procuring a license. If they were, it might be reasonable to suppose that the state exacted them for the purpose of informing itself as to the stability of the company before permitting it to carry on business. But on the contrary, they are of a sort which may naturally be considered as consequential to the commencement of business, and as intended to regulate its conduct in certain particulars, whilst themselves recognising that the company is free to carry it on without leave or license.

(C) It may perhaps be most reasonably said that the legislature in providing for the imposition of penalties has itself indicated here the only manner in which § 274 is to be enforced, and the only evil consequence which breaches of it are to entail upon a foreign company ; and that no indirect prohibitions need be read into the section. There would according to this opinion be no intrinsic illegality in the position of a foreign company which had not fulfilled the requirements of the section. It would possess the ordinary status and capacities. It would not be illegal for it to carry on business, so that its contracts would be valid and enforceable. The forfeiture of penalties would be its only punishment.

This view is supported by the best opinion as to similar statutes in the United States : and the arguments in its favour cannot be rendered better than in the words of certain eminent American judges. The following decision refers to the almost

exactly similar statute of the late territory of Colorado which like § 274 required a foreign company to file a copy of its charter within thirty days of commencing business. As in § 274, there were no express words to indicate that the fulfilment of this requirement was a condition precedent to the right to do business: and as in § 274, a penalty was imposed on officers of the company who failed to fulfil it. It was held that a foreign company which had failed to file a copy of its charter was yet capable of taking a mortgage of real estate, and that no prohibition to continue in business could be implied from the enactment. "Such prohibition," it was said<sup>1</sup>, "should appear with reasonable certainty. It cannot be assumed that the legislature intended more than it expressed, and I cannot find in the Act any prohibitory words whatever. Recognising the existence of foreign corporations, and their right to do business in the territory, the legislature requires them to file a copy of the charter, or other evidence of incorporation within a period of thirty days after commencing business, but there is nothing to indicate that this is a condition on which corporations may continue to do business. On the contrary, a penalty is given, which was probably thought to be sufficient to secure a proper observance of the Act. In the possible case—where a corporation may do business without an officer or agent in the state—the punishment would fail; but this will not authorise the addition of another penalty to that which is prescribed."

In the United States this opinion prevails even with regard to statutes which declare that their requirements are to be fulfilled by a foreign company before it commences business, or which go further and inflict a penalty on those which commence business before fulfilling the requirements. The following dicta of American judges summarise both the arguments and the authority on this point. "While the authorities upon the question are variant and conflicting in the state courts, the Federal courts have steadily adhered to the rule, which is sustained by the better reason and the more persuasive opinions in the courts of the states, that, in the absence of an express provision of statute to the contrary, the innocent contracts and acts of a foreign corporation which has failed to comply with the statutes

<sup>1</sup> per Hallett J. in *North Western Mutual Life Assurance Company v. Overholt* (1878), 4 Dillon at p. 289.

permitting it to do business in the state where the contracts are made and the acts are done are, nevertheless, valid and enforceable, because it is not the intent of the authors of such laws to strike down such agreements and acts where they are not evil in themselves<sup>1</sup>: and again "it is clearly not the primary purpose of the legislature in passing such statutes to render the contracts and dealings of such corporations, which have not complied with these requirements, void and unenforceable. Hence the decided weight of authority is, that, where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was enacted. Upon this ground it has been held that a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business will not, on that account, be held absolutely void unless the statute expressly so declares; and if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others<sup>2</sup>." So also it has been said that the absence of any express prohibition to carry on business in a similar statute of the state of Iowa, and the evident purpose of the statute to protect the public, showed that it was not the intention of the statute to render contracts void<sup>3</sup>: and it has been held that a foreign corporation which has failed to comply with a New Jersey Act forbidding foreign corporations to carry on business before fulfilling its requirements is nevertheless not an outlaw, but can protect its property from wilful damage<sup>4</sup>.

<sup>1</sup> per Caldwell, Sanborn, Thayer, J.J. in *Blodgett v. Lanyon Zinc Co.* (1903), 120 Fed. Rep., p. 893.

<sup>2</sup> per Snyder Pres. in *Toledo T. & L. Co. v. Thomas* (1890), 33 W. Va., p. 566; see also *Union M.L. Assurance Co. v. McMillen*, 24 Ohio St., p. 67; *American L. & T. Co. v. East & West Railway Co.* (1889), 37 Fed. Rep., p. 242; *The Manistee* (1873), 5 Biss, p. 381; *Hickory Farm Oil Co. v. Buffalo, N.Y. & P.R. Railway Co.* (1887), 32 Fed. Rep., p. 22; *Fretts v. Palmer* (1889), 132 U.S., p. 282; *Rogers & Co. v. Simmons* (1892), 155 Mass., 259; cp. also Murfree, *Law of Foreign Corporations* (1893), § 79; Mann, *Law of Foreign Business Corporations* (N.Y.) (1906), §§ 25, 111; Morawetz, *Law of Private Corporations*, §§ 662—666; and Thomson, *Law of Corporations*, §§ 7950—7960.

<sup>3</sup> per Gwen J. in *Pennyparker v. The Capital Insurance Co.* (1890), 80 Ia., p. 56.

<sup>4</sup> *Delaware & A. Telegraph & Telephone Co. v. Pensawken Township* (1902), 116 Fed. Rep., p. 910; cp. also *Bischoff v. Automobile Touring Co.* (1904), 97 ap. Dw. N.Y., p. 17.



The reasoning of these decisions concerning statutes which expressly state that the requirements are to be performed by a foreign corporation before it commences to carry on business, with or without penalties in default, applies *a fortiori* to § 274 of our statute, the requirements of which are to be performed by a foreign company after it has commenced to carry on business.

*Every company corporate or unincorporate, established out of the United Kingdom which commences to carry on the business of life assurance or of fire, accident, or employers' liability insurance, or bond investment business, within the United Kingdom is required (1) to deposit the sum of twenty thousand pounds in respect of each class of business with the Paymaster General, (2) to prepare an annual statement of its revenue and profit and loss account and of its balance sheet, and (3) once every five years at least to cause an investigation to be made into its financial condition by an actuary, and to file an abstract of his report and a statement of its business.*

21. These regulations are the substance of §§ 1—7 of the Assurance Companies Act, 1909, and constitute the more important restrictions and conditions to which foreign life Assurance Companies are liable in the conduct of their business. They are also required by the Act to keep their assurance funds separate from other funds (§ 3); to deposit statements and abstract with the Board of Trade to be kept by the Registrar of joint stock companies (§ 7); to supply copies of the statements (§ 8), of lists of shareholders (§ 10), and of their deed of settlement (§ 11) to shareholders and policy holders. Their accounts are to be audited annually as the Board of Trade may prescribe (§ 9). Amalgamation or transfer of their business is subject to the regulation of the court (§ 13 and § 14). In the original Act of 1870 the deposit under § 3 was made payable to the Accountant General of the Court of Chancery, for whom the Paymaster General was substituted by the Chancery Funds Act, 1872, §§ 4 and 6. The deposit is invested, and the interest paid to the company. Under the Act of 1870 it was repaid when the company's funds had accumulated to a certain extent. This is no longer the case. The Court may order an Assurance

Company established outside the United Kingdom to be wound up (§ 15).

Forms are scheduled to the Act in which the returns of the company are to be made. The requirement of the Act that an assurance company shall prepare an annual statement of its balance sheet and deposit it with the Board of Trade must now be read together with that of § 274 s.s. (3) of the Companies (Consolidation) Act, 1908, which requires every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom to file an annual statement in the form of a balance sheet with the registrar of companies. The classes of foreign companies dealt with by the two enactments may overlap, but their requirements are not inconsistent with each other. In general, by § 19 of the Act, § 274 of the Companies (Consolidation) Act is to apply to every assurance company constituted outside the United Kingdom which carries on assurance business within the United Kingdom whether incorporated or not. The provisions of the Companies (Consolidation) Act and of the Assurance Companies Act are therefore cumulative for Assurance Companies.

*An assurance company established out of the United Kingdom which makes default in complying with the last mentioned requirements is liable to pecuniary penalties: or if the default continue for a period of three months after notice from the Board of Trade, to be wound up.*

22. This is the substance of § 23 of the Assurance Companies Act of 1909. The Act itself thus indicates the manner in which a company is to be penalised for infringing its provisions: and it must be assumed, as has been seen<sup>1</sup>, that the penalty provided for is the only penalty intended. No room is left to imply any intention on the part of the legislature to invalidate the acts of a foreign life assurance company which has not performed some of its requirements.

<sup>1</sup> See ante, p. 234.

### Service of Process.

*Any process or notice required to be served on a company to which § 274 of the Companies (Consolidation) Act, 1908, applies shall be sufficiently served if addressed to any person whose name has been so filed as provided for by sub-section 1 (c) of that section and left at or sent by post to the address which has been so filed.*

23. This is sub-section (2) of section 274 of the Companies (Consolidation) Act, 1908<sup>1</sup>. It affects a considerable alteration in the forms of procedure as regards foreign companies: but it may be doubted whether it will in practice have the effect of rendering many foreign companies subject to the jurisdiction of English courts which would not have been subject to it under the former practice. It will be convenient to deal here in the first place with the general principles of the law relating to service on foreign corporations based on the Common Law and the Rules of the Supreme Court; and in the second place with the alterations effected in those principles by this enactment. Knowledge of general principles is of assistance in determining the effect of the statute: nor are the principles obsolete as positive law. The section applies only to companies incorporated outside the United Kingdom which establish a place of business within the United Kingdom: and we must resort to general principles to determine the law of service in relation to foreign corporations within the jurisdiction to which the section does not apply, *i.e.* Scottish and Irish corporations, and foreign corporations which are not companies, or foreign companies which do not establish a place of business here.

*Service of process may be effected on a foreign corporation which itself carries on business at a place of business here (in which case it may be said to be present or resident here) by serving it upon the head officer of its business here.*

24. The head officer upon whom service is made must be (a) one whose position is of such responsibility that his knowledge is the knowledge of the corporation; (b) chief of the English establishment; (c) if there is more than one English establishment his authority must extend over them all.

<sup>1</sup> Formerly § 35 s.s. 2 of the Companies Act, 1907.

The law of service on foreign corporations within the jurisdiction presents some difficulties and has given rise to much discussion. It has been evolved by combining the principles of the law of service on foreigners in general with those of the law of service on corporations in general.

As to the latter, it was the old rule of the common law that in proceedings against corporations, process need only be served on an officer of the corporation, but that officer must be the head officer<sup>1</sup> since a corporation could not be compelled to appear in person<sup>2</sup>. If the corporation failed to appear after service, the next step in the proceedings was a distringas, under which the sheriff might distrain the lands and goods of the corporation, and if it had no such lands or goods there was nothing more to be done. The Uniformity of Process Act of 1832 (2 Will. IV. c. 39) which substituted a Writ of Summons for the existing variety of process for the commencement of personal actions provided (§ 13) that "every such Writ of Summons issued against a Corporation Aggregate may be served on the Mayor or other Head Officer, or on the Town Clerk, Clerk, Treasurer or Secretary of such Corporation." This provision was re-enacted verbatim by § 16 of The Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76). In effect it was declaratory only, and made no alteration in the rule of the common law. It was supplemented by Rule 7 of Order 9 of the Rules of Court of 1875, made in pursuance of the Judicature Act, which provided that whenever by any statute provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or upon any hundred or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons might be served in the manner as provided. With this addition it remained in force till it was repealed by the Statute Law Revision Act of 1883. In the same year it was replaced, together with Or. 9 r. 7 of the Rules of Court of 1875, by Or. 9 r. 8 of the Rules of Court of 1883 which combines the two as follows: "In the absence of any statutory provision regulating service of process<sup>3</sup>, every

<sup>1</sup> *Harvey v. East India Co.* (1700), *Prec. in Ch.* at p. 131.

<sup>2</sup> *Harvey v. E. I. Co.* (*sup.*). *Tidd's Practice* (1828), p. 121.

<sup>3</sup> The chief statutory provisions regulating service in particular cases are § 62 of the Companies Act, 1862, § 135 of the Companies Clauses Act (8 & 9 Vict. c. 16),

writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, treasurer, or secretary of such corporation," and after regulating the mode of service on "inhabitants" concludes: "and where by any statute, provision is made for service of any writ of summons, bill, petition, summons, or other process upon any corporation or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, every writ of summons may be served in the manner so provided." Such is now the state of the law as to the service on corporations in general.

The principles of the Common Law as to service on foreigners in general had to be combined with its principles as to service on corporations in general in order to deduce a principle as to service on foreign corporations. They are very simple. Service may be effected in a proper case, and that is in any transitory action, on any person present within the jurisdiction of the court, for however short a time. "Though every fact arose abroad," it has been said, "and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the court had been brought to bear against the defendant by service of a writ on him when present in England<sup>1</sup>."

From such general principles it would follow that service could only be effected upon a foreign corporation (*a*) if it were present within the jurisdiction, (*b*) if it had within the jurisdiction someone in the nature of a head officer. In order therefore that it should be capable of being served with process, it must be capable of being present within the jurisdiction. It will be seen from the following cases that when this question came up for discussion it was decided, not without difficulty, that a foreign corporation was capable of being present within the jurisdiction and of having a head officer there, and that service could in consequence be effected on it.

§ 134 of the Lands Clauses Act (8 & 9 Vict. c. 18), and § 138 of the Railway Clauses Act (8 & 9 Vict. c. 20), all of which provide for service on a company by leaving the document to be served at or sending it through the post to the registered or principal office of the company.

<sup>1</sup> Jackson v. Spittall, L.R. 5 C.P. at p. 549, per Brett J.; see also Westlake, *op. cit.*, p. 229.

The first case in which questions relating to the service of process on a foreign corporation were fully considered was *The Carron Iron Co. Proprietors v. MacLaren*<sup>1</sup> which may be said to be the leading case on the subject. A decree had been made in England for the administration of the estate of the English manager of a company incorporated by charter under the Union Seal of Scotland to manufacture iron at Carron in Scotland. The company had offices in London and Liverpool where it had agents for sale and warehouses and assets also, but its chief office of management was in Scotland. As a creditor of its manager for £10,000 it proceeded in Scotland against his Scottish assets independently and in spite of the decree for administration. Notice of motion for an injunction to restrain the company from the proceedings in Scotland was served at its office in London, and the injunction was granted by the court in the absence of the company. The company moved to dissolve the injunction. The questions at issue were whether the company was present within the jurisdiction of the court so that (a) service of notice of the motion could properly be effected on it, (b) the court could exercise over it its jurisdiction *in personam*. It was held by Romilly M.R. that the company was present within the jurisdiction. "It may be true," he said, "that this company has a Scotch charter and may be called a Scotch company but I consider it impossible to say that any corporation so circumstanced is not (if I may use the word) resident at that office where in point of fact it has an agent carrying on business on its behalf, and in its name." He decided accordingly that the notice of motion had been properly served on the company. Having decided also that "it cannot consistently with the authorities be disputed that after such a decree a creditor residing in this country cannot proceed in a foreign court<sup>2</sup>" he dismissed the motion. His decision was reversed by the majority of the House of Lords—Cranworth L.C. and Lord Brougham—Lord St Leonards dissenting. The basis of the decision of the majority, as given by Lord Cranworth, was that the company must be treated as locally situated in Scotland only, and that the existence of agencies for sale in England, although it might enable third parties to sue the principals, by

<sup>1</sup> (1855) 5 H.L.C. 416.

<sup>2</sup> *MacLaren v. Stainton* (1852), 16 Beav. at p. 286.

reason of their being for certain purposes represented by their agents, yet did not suffice to enable the company to be served in the case at issue, or to enable the court to exercise over it its jurisdiction *in personam*<sup>1</sup>. Lord St Leonards on the other hand, in a judgment since repeatedly quoted with approval both in English and American cases, said, "I think that this company may properly be deemed both Scotch and English. It may for the purposes of jurisdiction be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The place of business may, for the purposes of jurisdiction, properly be deemed the domicile. The company cannot have the benefit of a place of business here without yielding to the persons with whom it deals a corresponding advantage. The claim of the company is in respect of dealings here. Service on one member of a company is good service. Upon general reasoning I think the company may for the purposes of the suit in chancery be treated as within our jurisdiction<sup>2</sup>." And again "there is no jurisdiction here because the *agent* is resident here. The jurisdiction if it exists is because the appellants are here by their houses of business and their agents, just as they are in Scotland by their ditto. They carry on as great a business here as in Scotland. They manufactured in Scotland and sold in England. It is not therefore a question of attacking the agent as agent. If the service upon the agent is right, it is because in respect of their house of business in England they have a domicile in England. And in respect of their manufacture in Scotland they have a domicile there. There may be two domiciles and two jurisdictions: and in this case there are<sup>3</sup>."

The conflict between these important judgments is not as to the law but as to the application of the law to the facts. The judgment of the majority of the court does not differ from that of Lord St Leonards as to his statement of principles, which became the basis of many future decisions. At the same time it must be observed that Lord St Leonards' use of the word domicile in this passage was capable of causing, and has caused,

<sup>1</sup> At p. 436.

<sup>2</sup> At p. 449.

<sup>3</sup> At p. 458.

no little confusion. His words have been quoted as authority for the proposition that a company may have two domiciles in the full sense of that word, from which it would follow that it might have two personal laws, and two nationalities. But it was not necessary for the decision to say, nor, it may be suspected, did the eminent judge mean to say, more than that a company may have two residences, or two places where it is present only. He qualifies the expression domicile throughout as "domicile for the purpose of jurisdiction": and a domicile for the purpose of jurisdiction according to our law is nothing more than a place where the person in question is present, for however short a period of time.

His decision is however of the first importance. It is a full recognition, and the first, of the principle which is now fairly established in our law, that a corporation may be present and resident outside the state in which it is domestic. It has been seen in the first part of this work that the establishment of this principle in the United States was achieved by means only of the invention of an elaborate theory and a technical artifice, designed to reconcile it with the doctrine that the personality of a corporation is pure fiction. When the evolution of corporate life demanded it, it became part of our law without any attempt being made to reconcile it with accepted theories as to the nature of corporations, without even any express recognition of the fact that it needed any reconciliation. The result in both cases is the same<sup>1</sup>.

It was not until the year 1872 in the case of *Newby v. Von Oppen and the Colt's Patent Firearms Manufacturing Company*<sup>2</sup> that it was decided that a foreign corporation can be served with a writ and appear as a defendant in an action at law. Before that time, as has been seen, foreign corporations had not unfrequently appeared as plaintiffs, but never as defendants, and questions as to service of a writ had not been raised. The defendant company was an American company having a place of business in England, but its head office in the United States. A writ was served on the manager of the business in England who was the head officer and the only officer of the

<sup>1</sup> The American theory has been expressly disapproved by the Court of Appeal, see *De Beers, &c. v. Howe*, post, p. 249.

<sup>2</sup> (1872) L.R. 7 Q.B. 293.



English branch, but not the head officer of the corporation. It was held (referring to *Carron Co. v. MacLaren sup.* and Lord St Leonards' judgment therein) that since the defendant company had a place of business and themselves traded in London, they must be treated as resident there, although it would be otherwise if they only employed an agent there to make a contract for them. As to the sufficiency of the service on one who was only a local head officer and not the general head officer, it was said "the clerk or officer must be in the nature of a head officer whose knowledge would be that of the corporation. We think that once it is established that the corporation is to be treated as resident in England, the proper officer is the officer at the English branch and that it is not necessary to serve the process on the officer at the head office abroad<sup>1</sup>."

The effect of the leading cases referred to above may, it is submitted, be summed up in the general rule stated at the head of this section. The rule has been frequently discussed and directions for its application in particular circumstances have been given. The authorities upon the question when a foreign corporation may be said to be carrying on business in England so that service may be effected on it, and when the business carried on is that of their agent only, have already been discussed above<sup>2</sup>, and it is unnecessary to refer to them further here. The following cases cast further light upon the matter.

*Palmer and Another v. Gould's Manufacturing Co.*<sup>3</sup> was an action against an American company for the non-delivery of machines, on a contract made in Russia by the defendant, who was the general European manager of the defendant company. The writ was served on the defendant at the company's place of business in London. Field J. said "the question is whether Gould's Manufacturing Company are here. They have a real domicile in New York but it does not follow that they have not a good domicile here for purposes of business and service": and the service was held good. The distinction made between "real domicile" and "domicile for purposes of service" is noteworthy. If the word "domicile" is to be used to express a place where

<sup>1</sup> Judgment of court per Blackburn J. at p. 295.

<sup>2</sup> See ante, p. 219.

<sup>3</sup> (1889) W.N., p. 63.

service can be effected, some such qualification is necessary to make it clear that the same consequences do not attach to the possession of a domicile in the limited sense, that attach to the possession of a true, or "real," domicile. In *Wood v. Anderston Foundry Co.*<sup>1</sup> the effect of the Judicature Act and of the rules of the Supreme Court was considered. "As a general rule," it was said by Stirling J., "a foreigner whatever his nationality or domicile is liable to be sued in this country if found within the jurisdiction. When a foreigner is a person, personal service may be effected upon him. But when a foreigner is a mere legal entity such as a corporation two questions arise: (1) when can a foreign corporation be said to be within the jurisdiction; (2) if present how can it be served. Both questions were considered in *Newby v. Von Oppen*. Upon (1) the conclusion at which the court arrived was that if you found a foreign corporation carrying on business within the jurisdiction then they could be treated as resident there. Now as to the first point, there is nothing in the Judicature Acts to alter that. As to the second point, the rules now in force have made a great difference. That is evident by comparing § 16 of the Common Law Procedure Act of 1852 with the present rules, *e.g.* Or. 72 r. 2 and Or. 9 r. 8: *i.e.* the absolute words in the Common Law Procedure Acts are now governed by the exception as to statutory provisions. The two clauses [*i.e.* the two clauses of Or. 9 r. 8] provide for different cases, and the mode of service provided by the last clause is not cumulative or additional to that by the first clause." It will be seen hereafter that this decision is of importance in connection with the new statutory exception created by § 35 s.s. 1 (c) and 2 of the Companies Act, 1907<sup>2</sup>. In *Haggin v. Comptoir d'Escompte de Paris*<sup>3</sup>, *Newby v. Von Oppen* was considered and followed. The defendants were a French Banking Company which had a branch office in London and the writ in the action was served upon the manager of this branch. It was held that the service was good service. "Or. 9 r. 8," said Cotton L.J.<sup>4</sup>, "applies to a corporation established by foreign law, but not if it does not carry on business and has no residence in England. It would be wrong to say that the rule does not apply to foreign corporations, that is, corporations established by foreign law which are

<sup>1</sup> (1888) 36 W.R. 918.

<sup>3</sup> (1889) 23 Q.B.D. 519.

<sup>2</sup> See post, p. 251.

<sup>4</sup> At p. 521.

carrying on business, and therefore resident in England and are submitting themselves to the laws of this country. When a foreign corporation established by foreign law sets up an office in England and carries on one of the principal parts of its business here, it ought to be considered as resident in England and to be treated as if it were established by English law. In my opinion that is the law independently of all decisions, but *Newby v. Von Oppen* is an authority for that view." When the learned judge says here that the foreign corporation ought to be treated as if it were established by English law, he must mean as far as concerns service of process. It is not necessary for the decision that any wider meaning should be given to his words, and to do so would be to bring them into conflict with direct authorities to the contrary<sup>1</sup>. In *Badcock v. Cumberland Gap Park Company*<sup>2</sup> the preceding case was approved and followed. The defendants were a company incorporated in the state of Tennessee to keep an American hotel. Their head office was in America. Three-fourths of the capital was held by English shareholders and the company employed an agent in England who kept an office where dealings in the shares in England were recorded. The agent acted for other companies, whose names were painted up at his office: but part of the office furniture belonged to the defendant company. The writ in an action to restrain reconstruction of the company was served upon the agent. The court set aside the service on the ground that the company was not carrying on business here within the rule in *Haggin v. Comptoir d'Escompte de Paris*. "Is it established," said Stirling J.<sup>3</sup>, "that the defendant company carries on a principal part of its business here in London? It is not enough that the foreign company should possess property in this country. You must prove that it is carrying on business in such a way as to be resident in this country." The principle of *Newby v. Von Oppen* was again expressly approved in *Palmer v. Caledonian Railway Company*<sup>4</sup>, where it was said by Fry L.J.<sup>5</sup>, "it is said that under the rules of the Supreme Court there is power to serve a foreign corporation provided it has a place of business":

<sup>1</sup> See ante, p. 182.

<sup>2</sup> (1892) 93 1 Ch. 362.

<sup>3</sup> At p. 366.

<sup>4</sup> (1892) 1 Q.B., p. 823, overruling *Wilson v. The Caledonian Railway Company* (1850), 5 Ex., p. 822.

<sup>5</sup> At p. 829.

and then, referring to *Newby v. Von Oppen*, "I am not inclined in any way to diminish the authority of that case. I think it is of great importance in a country like ours where foreign corporations carry on business to a large extent under the protection of our laws that they should by having a place of business within the jurisdiction submit themselves to the jurisdiction of the courts." In *La Compagnie Générale Transatlantique v. T. Law & Co.*<sup>1</sup> the subject was thus summarised by Collins L.J. in the Court of Appeal<sup>2</sup>. "When it was sought to bring a foreign corporation within the jurisdiction the proposition was met at once by the *prima facie* presumption that a foreign corporation had to be reached if at all by some machinery for serving process out of the jurisdiction. Then arose for discussion the cases in which a corporation, which has one entity, carried on business in more than one place so as to admit of the contention that though one and indivisible it might have more than one domicile. That was the question discussed in *Carron Co. and MacLaren*: and it is clear now that a corporation may have more than one domicile. In the case of a foreign corporation it is necessary to get at the question of its domicile by reference to the mode and place in which it carries on its business. That is the origin of the discussion as to residence: and the result is that if a foreign corporation is found to be actually carrying on business in this country at a fixed place process can be served upon it." The judgment of the Court of Appeal was confirmed by the House of Lords<sup>3</sup>, when Halsbury L.C., still further summarising the matter, said<sup>4</sup>: "The appellants are resident here in the only sense in which a company can be resident, they are here: and if they are here, they may be served. This is a question of fact." It will be observed that Collins L.J. following Lord St Leonards in *Carron Co. v. MacLaren* holds that a company can have two domiciles: but here as in the former case the domicile intended is a domicile for the purposes of service and the exercise of jurisdiction only, which is in fact no true domicile, but a mere place of residence, or rather presence. The preceding cases were followed and approved in *Logan v. Bank of Scotland and others*<sup>5</sup>. The defendant company

<sup>1</sup> (1899) P., p. 1.<sup>2</sup> At p. 16.<sup>3</sup> (1899) A.C., p. 431.<sup>4</sup> At p. 433.<sup>5</sup> (1904) 2 K.B. 495.

was incorporated by a statute, which made no provision as to service of process upon it. A writ was served upon the manager of its London branch, and it was held that the service was within Or. 9 r. 8, and good. "If a foreigner is found within the jurisdiction," said the court<sup>1</sup>, "he may be served with a writ, although the cause of action did not arise in England. Why should there be any difference as to the right to serve a foreign corporation which is found to have a place of business and to be trading in this country and which is therefore to be treated as resident here."

The principles thus established were considered and approved by the Court of Appeal in *De Beers Consolidated Mines Ltd. v. Howe*<sup>2</sup> in applying to the case of a foreign company the provisions of Schedule D of clause 2 of the Income Tax Act, 1853, relating to persons "residing" within the United Kingdom. The case for the company, negating residence, was based upon the rigid American doctrine established in *Bank of Augusta v. Earle*<sup>3</sup> that a corporation cannot reside outside the sovereignty of the country wherein it was incorporated. This argument was disapproved by the court. It was said by Collins M.R.<sup>4</sup>, "However this may be in American law, it seems to me clear that by the law of this country a foreign corporation is capable of residing in this country." After referring to the judgment of Lord St Leonards in *Carron Iron Co. v. MacLaren*, quoted above, he continues, dealing with the principles established by the cases on service under Or. 9 r. 8, "the first step which had to be taken was to decide that the rule covered a foreign as well as an English corporation. Then in dealing with the question whether such a corporation was properly served, it became necessary to consider whether it was resident in this country. Hence those cases were certainly decided on the view that the particular corporation in question was resident in this country when the writ was served. They are certainly authorities against the existence of a hard and fast line confining the residence of a foreign corporation to the country in which it is incorporated." It was said by Matthew L.J. referring to the American cases<sup>5</sup> "when these cases are looked at, they only appear to indicate the existence of an opinion on the part of

<sup>1</sup> At p. 499.

<sup>2</sup> (1905) 2 K.B., p. 612, s.c. (1906) A.C., p. 455.

<sup>3</sup> Ante, p. 26.

<sup>4</sup> At p. 635.

<sup>5</sup> At p. 641.

some American lawyers of a somewhat technical nature—namely, that in legal theory corporations cannot have any existence outside the boundaries of the country in which they are incorporated: but that theory appears practically to have but little substance in it. The practice of business and of the law appears quite inconsistent with such a view. It is clear from the cases that under the rules a foreign corporation may be served with a writ in this country. The question in such cases is whether the corporation resides within the jurisdiction; and whenever it is found to be occupying by means of its officers premises in this country its residence here would seem to be established for purposes of service.”

The following decisions define further the characteristics of a head officer upon whom service can be effected, and are in particular the authority for qualification (*c*) stated in the general rule at the head of this section. In *Mackereth v. The Glasgow & South Western Railway Co.*<sup>1</sup> the defendants were a Scottish Railway Company. They had running powers to Carlisle, where they had a booking office and clerk: and they had no other English office. They had the use of Carlisle station at a rental. It was held that the booking clerk was not a head officer, or a clerk within the meaning of § 16 of the Common Law Procedure Act of 1852: and that he could not be served with a writ on behalf of the defendant company. “‘Clerk’ here,” said Bramwell B.<sup>2</sup>, “does not mean any clerk, but a principal clerk, like a town clerk,” and the words of Blackburn J. in *Newby v. Von Oppen* were criticised by him and by Pollock B. on the grounds that they were so wide that they would admit service on a porter. In *Walter Nutter & Co. v. Messageries Maritimes de France*<sup>3</sup> it was said by Coleridge C.J.<sup>4</sup>, “The words of the rule must be followed strictly in order to avoid the obvious inconveniences of suing foreign corporations. The expression the clerk or secretary clearly points to some single and definite person.” And Smith J. said in substance, that if a foreign company carried on business at A and B in London and service were effected on X who was their agent at A only, the service would without question be bad. *Golding v. The Order of*

<sup>1</sup> (1873) L.R. 8 Ex., p. 149.

<sup>2</sup> (1885) 54 L.J. Q.B., p. 527.

<sup>3</sup> At p. 151.

<sup>4</sup> At p. 528.

La Sainte Union des Sacrés Cœurs<sup>1</sup> confirms this dictum of Smith J. The circumstances of that case were somewhat out of the common: they concerned a foreign corporation which was not in the ordinary sense of the word a business affair. The defendant Order was a religious Order, the head house and government of which were in France. It also had houses in England where the "business" of keeping school was conducted. An action was brought against the Order by an ex-nun to recover sums paid by her while cloistered. The writ was served on the Mother Superior of an English Convent of the Order who had no authority in the management of the Order. It was held that the service was bad. Esher M.R. said he would assume that the Order was a foreign corporation, and proceeded, "a head officer must be a person who manages the business. Here the business in England was carried on at several places. Who manages that business? If it was shown that a person at one of those places managed the others, it might be said that that person managed the business. In this case the person served managed the business at H. only, she was therefore not the chief manager." "I put the case," said Lopes L.J., "of a large banking company in this country having several offices, all co-ordinate, and the service of the writ on the manager of one of those offices. There is no distinction from this. The fact that this is a foreign company makes no difference." Kay L.J. however reserved his opinion on this point, and based his decision on the fact only that the Mother Superior had no authority in the control of the Order, and so was not a head officer. It is clear that the rule laid down by these cases provided a foreign corporation with a means of evading service altogether: it had but to establish two co-ordinate branches or places of business in this country, retaining for the foreign head office direct control over both, and giving the manager of neither authority over the other, and there was then nobody to serve. This was an obvious anomaly in the law; it has been remedied in practice, at least, if not in theory, by s.s. 1 (c) and (2) of § 274 of the Companies (Consolidation) Act, 1908.

<sup>1</sup> (1892) 67 L.T., pp. 309, 606.

*A foreign corporation can appoint a person to accept service of process on its behalf in England; and service upon that person is good service on the company, although it would not, apart from the appointment, have been good service within the rules.*

25. This was the law even before the enactment of § 274 s.s. 1 (1) and (2) of the Companies (Consolidation) Act, 1908. In the *Tharsis Sulphur & Copper Company v. La Société Industrielle et Commerciale des Métaux*<sup>1</sup>, the plaintiff company made a contract in Paris with the defendant company for the sale of copper and its delivery to the defendants over a period of three years. It was a term of the contract that the defendants should submit to the jurisdiction of the English courts, and that the English firm of L. & Co. should be agents of the defendants' for service. It was stated in the contract that the appointment of L. & Co. was irrevocable, and that the defendant company "for the purpose of the contract hereby elect domicile at the office of the said firm." The defendant company went into liquidation, and further delivery of the copper was rejected. The action was commenced for breach of contract, and process was served on L. & Co. and by sending a copy of the writ to the defendant company's head office in Paris. An application to set aside the service was refused. Field J. said, "it is not good service within the rules, but it was competent to the parties to contract themselves out of the rules, and, being abroad, to appoint persons here for the purpose of accepting service for them." And again<sup>2</sup>, "on principle one person may appoint another for consideration as agent to accept service and may contract with someone else that that person shall be the person to accept service." So also in *Société Industrielle et Commerciale des Métaux v. Companhia Portuguesa dos Minas de Huelva*<sup>3</sup>, in which both plaintiff and defendant were foreign companies, North J. said "a foreigner can contract to have domicile for the purpose of being sued within the jurisdiction," but held that there was no evidence of such a contract: and in *Kane v. German*

<sup>1</sup> (1889) 58 L.J. Q.B., p. 435; cp. *Vallée v. Dumergue* (1849), 4 Ex. R. at p. 303.

<sup>2</sup> At p. 438.

<sup>3</sup> (1889) W.N., p. 32.



Marine Insurance Association<sup>1</sup>, where a policy granted by a foreign insurance company contained a clause "in case of dispute the Association agrees to be bound by the jurisdiction and decision of the English Law Courts, and agents are further empowered to sue and accept service on behalf of the Association," it was held by Wills J. in chambers that service on a person having the management of the company's London agency was sufficient. The effect of § 274 s.s. 1 (c) and 2 of the Companies (Consolidation) Act, 1908, has only been to render obligatory for certain foreign companies that which according to these decisions was optional for them all.

*Effect of § 274 of the Companies (Consolidation) Act  
on the law as to service of process.*

26. It remains to consider the effect of those sub-sections and the alteration effected by them in the law as stated above. Service upon companies to which the section applies is now no longer regulated by the general clause of Or. 9 r. 8. There is a statutory provision regulating service upon them, and they fall therefore within the initial excepting clause of the rule. Process must be served upon them in the manner provided by the statute, and in no other manner; for, as it has been seen, it has been held that the mode of service provided by the general clause is not cumulative or additional to that provided for in the statute<sup>2</sup>. It would seem therefore that if a company to which the section applies fails in breach of the section to comply with its provisions as to the appointment of an agent for service, no service can be effected upon it at all, neither the means provided by the statute nor those provided by the rule being available.

It is clear from the wording of the section that there need be no connection between the company and the person or persons authorised to accept service on their behalf other than the authorisation. The company may, if they please, appoint a subordinate clerk or a person not resident at their place of business, or one wholly unconnected with their business. There is nothing in this contrary to principle. It has always been the

<sup>1</sup> 6th Aug., 1889, reported in the *Annual Practice* only (*sub* Or. 9, r. 8). See also *Royal Exchange Assurance Corporation v. Sjöförsäkrings Aktiebolaget Vega* (1901), 2 K.B. at p. 568; and *Montgomery v. Lieberthal* (1898), 1 Q.B., p. 487.

<sup>2</sup> *Wood v. Anderston Foundry Co.* (1888), 36 W.R., p. 918.

rule, as has been seen, that a foreign company may contract to submit itself to the jurisdiction, and nominate a person to accept service in a particular case, service upon whom would not otherwise have been good service upon the company. The present enactment only generalises that rule, and makes it compulsory. The distinction between a head officer and other officers is therefore no longer of any interest in connection with questions of service upon such companies. The sole and sufficient circumstance necessary to qualify a person as one upon whom service can be made for the company is whether his name has been filed with the registrar as authorised to accept service on its behalf. "Any process or notice," says the statute, "required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed." It is the public filing with which the person who desires to serve process on the company is concerned, and not with the private authorisation. If the name of a person is filed as authorised, it matters not whether he is in fact authorised or not. A foreign company cannot therefore seek to set aside service on the ground that it has cancelled its authorisation to a person whose name is still on the register. It must remove his name and substitute another; and till it has done so, service upon the person whose name is filed is good service upon the company, since third parties are concerned with the filing only, and not with the relations between the company and its agents. For the same reason if the company file the name of one unwilling to act, or allow the name of one who has been willing to act to remain on the register after he has ceased to be so, that is at their own peril, and cannot affect the validity of the service.

The section facilitates service in every case, in so far as it is easier to look up a name in a register than to learn and apply a rule of law. In particular, it removes the difficulties which were experienced under the former practice of effecting service on a foreign company which has a place of business here, but no head officer at its place of business: or several co-ordinate places of business with a head officer at each, but no officer with authority over them all.

Sub-section (2) providing for service by post is similar to § 116 of the Act<sup>1</sup>, § 135 of the Companies Clauses Act (8 & 9

<sup>1</sup> Formerly § 62 of the Companies Act, 1862.

Vict. c. 16), § 134 of the Lands Clauses Act (8 & 9 Vict. c. 18), and § 138 of the Railway Clauses Act (8 & 9 Vict. c. 20): and for the law relating to postal service the reader is referred to decisions on those sections and to treatises on service in general.

*Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge on a foreign corporation under the circumstances specified in Order 11, rule 1, and in the manner provided for by Or. 2 r. 4 of the Rules of Court, 1883.*

27. Service out of the jurisdiction is not affected by § 274 of the Companies (Consolidation) Act, 1908. The principle stated follows from decisions referred to below, to the effect that Or. 11 r. 1 and Or. 2 r. 4 of the Rules of Court of 1883 apply to foreign corporations in the same manner as they apply to other foreigners.

Before the Judicature Acts the state of the law relating to service out of the jurisdiction was as follows. The Court of Chancery had power under the statutes 2 Will. IV. c. 33 and 4 & 5 Will. IV. c. 82 to direct process to be served in parts of the United Kingdom outside their jurisdiction in suits concerning lands and charges on lands. They also had power, at any rate by virtue of the third of the general orders of May 1845 (made in pursuance of 3 & 4 Vict. c. 94 and 4 & 5 Vict. c. 52), renewed by the seventh rule of the tenth of the Consolidated Orders of 1860 (made in pursuance of 15 & 16 Vict. c. 86), to order service of a copy of a bill on a defendant in any suit out of the jurisdiction<sup>1</sup>. The courts of Common Law on the other hand had no power to order service of process on a defendant outside their jurisdiction even in a transitory action. In order to proceed against such a defendant, a plaintiff had no course to adopt but the obsolete, cumbrous, and inconclusive process of Outlawry<sup>2</sup>. The Uniformity of Process Act (2 Will. IV. c. 39) simplified the process of Outlawry (§ V), and provided an alternative method

<sup>1</sup> Drummond v. Drummond (1866), L.R. 2 Ch., p. 32. It was a moot point whether the court had inherent power to order service out of the jurisdiction apart from these orders. According to the judgment of Lord Chelmsford L.C. in this case (at p. 39) it is the better opinion that they had; see also Whitmore v. Ryan, 4 Hare 612.

<sup>2</sup> Cp. 1st Report of Commissioners on the Courts of Common Law, p. 90 (1829); and see Ingate v. Lloyd Austriaco (1858), 4 C.B. N.S. per Wills J. at p. 709; Lenders v. Anderson (1883), 12 Q.B.D. per Huddleston B. at p. 56.

of enforcing appearance by writ of *distringas*, followed, if that were ineffective, by an application for leave to enter appearance for the defendant. But it was not until the passage of the Common Law Procedure Act of 1852 that the courts of Common Law obtained power to direct service out of the jurisdiction. Sections 16, 18 and 19 of that Act provided for the issue of a writ against a person residing out of the jurisdiction of the courts (except in Scotland and Ireland) and not being a British subject<sup>1</sup>, and for service of notice of the writ upon the defendant, and empowered the court to give the defendant leave to take further proceedings on the writ.

Such was the general condition of the law when questions relating to the service of process on foreign corporations within and without the jurisdiction first became the subject of judicial consideration. The effect of the application of the general law to foreign corporations was that the Court of Chancery was held to have power in virtue of the seventh rule of the tenth of the Consolidation Orders, and probably to have had power at all times, to order service out of the jurisdiction on foreign corporations. In *Lewis v. Baldwin*<sup>2</sup> it exercised that power in the case of an Irish corporation having an office in Ireland only. The courts of Common Law on the other hand were held to have no power to order service out of the jurisdiction on foreign corporations.

They certainly had no power to do so before the Common Law Procedure Act. In *Evans v. Dublin & Drogheda Railway Company*<sup>3</sup> it was held that service effected in London upon a director of the defendants, an Irish Railway Company, casually present in London, was null and void, on the grounds that the company had no office in England, and no officer authorised to represent them here, and was therefore not amenable to process. Nor did the Common Law Procedure Act give them power to do so. In *Ingate v. Lloyd Austriaco*<sup>4</sup> it was held that neither §§ 16, 18, or 19 of that Act applied to the case of proceedings against foreign corporations carrying on business abroad, and not within the United Kingdom, on the grounds that the wording of those

<sup>1</sup> § 18 makes similar provisions with respect to British subjects.

<sup>2</sup> (1848) 11 Beav. 153; and see *in re* Forth Insurance Co. (1846), 9 Beav. 469.

<sup>3</sup> (1845) 11 M. & W., p. 142.

<sup>4</sup> (1858) 4 C.B. N.S., p. 704; *con.* *Scott v. Royal Wax Candle Co.* (1876), 1 Q.B.D. 404.

sections could not be extended to apply to foreign corporations as distinguished from natural persons. "We have no means," it was said, "of knowing the constitution and attributes of such a body. It may be altogether different from our incorporated companies<sup>1</sup>." This dictum reveals the reason for the difference between the practice of the Court of Chancery and that of the courts of Common Law in this respect. According to the Chancery practice, leave was necessary to issue a subpoena to appear and answer a bill, and on the application directions could be obtained how the service was to be effected on the defendant out of the jurisdiction. No leave on the other hand was necessary to issue a writ, and so there was no opportunity of obtaining directions as to what service would satisfy the court as personal service on the corporation<sup>2</sup>.

At the same time, however, it was held that there was no objection on principle to service on a foreign corporation out of the jurisdiction. The difficulty was one of lack of means only, and could be legitimately overcome by the statutory provision of machinery whereby the service could be effected, *e.g.* by substituted service. This is clear from the decision in *Sheehy v. Professional Life Assurance Company*<sup>3</sup>. Section 9 of the Irish Common Law Procedure Act (13 & 14 Vict. c. 18) provided for service on persons out of the jurisdiction of the Irish courts by substituted service on a servant or agent. Under this statute an order was made by the Court of Queen's Bench in Ireland for service of a writ against an English joint stock company which carried on business in Ireland through an agent by delivering a copy to the agent and sending copies by post to the company in London. Judgment was afterwards signed, the plaintiffs entering an appearance for the defendant company. It was held that an action was maintainable in the Court of Common Pleas on this judgment, on the grounds that it was not contrary to natural justice and that the Irish court was acting within its jurisdiction. The *Royal Mail S.S. Company v. Robert Butler Braham*<sup>4</sup> was a decision similar in effect. The appellant company was an English company which carried on business in

<sup>1</sup> per Byles J. at p. 707.

<sup>2</sup> *Cp. Westman v. Aktiebolaget Ekmans Mekaniska Sneckarefabrik* (1876), 1 Ex. D. per Amphlett B. at p. 241.

<sup>3</sup> (1857) 3 C.B. N.S. 597.

<sup>4</sup> (1877) 2 A.C. (P.C.), p. 381.

Jamaica by a superintendent. In an action brought by the respondent in the Jamaica courts, a writ was served on the superintendent of the company under a judge's order for substituted service made under sec. 19 of the Jamaica Supreme Court Procedure Law, Number 41 of 1872, which like the Irish statute in the case last mentioned, provides for service on persons residing out of the jurisdiction of the Jamaica Court by substituted service on a servant or agent. The Supreme Court of Jamaica refused to set aside the judge's order, and the company appealed to the Privy Council. It was held that the service was good, on the ground that the word "persons" in sec. 19 applied to corporations as well as to natural persons. The similar sec. 19 of the Common Law Procedure Act of 1852, concerning which a precisely contrary decision was given in *Ingate v. Lloyd Austriaco*, was distinguished on the grounds that it referred to personal, and not substituted service; and *Sheehy v. Professional Life Assurance Co.* was referred to with approval and followed.

The two decisions last referred to showed not only that there was no objection on principle to the service of process on a company outside the jurisdiction, but cast some doubt on the decision in *Ingate v. Lloyd Austriaco*, since they declined to follow it in interpreting sections in statutes the wording of which did not differ substantially from that of the section under discussion therein. The case was also questioned after the passage of the Judicature Act in *Scott v. Royal Wax Candle Company*<sup>1</sup>. But in the interval it governed the practice of the courts.

The Judicature Acts and the Rules of the Supreme Court made under its authority effected a great alteration in the law. The Rules at present in force, which are those of 1883, so far as they are relevant to service on corporations and service out of the jurisdiction, are identical with those that came into force in 1875. Order 2 provides a complete code for service out of the jurisdiction, superseding the former practice<sup>2</sup>. Its provisions may be summarised as follows. Service out of the jurisdiction may be allowed by the court or a judge in seven specified cases (r. 1); but where leave is asked to serve a writ in Scotland or in Ireland, if it shall appear that there may be a concurrent remedy

<sup>1</sup> (1876) 1 Queen's Bench Division 404.

<sup>2</sup> *In re* Busfield (1886), 32 Ch. D., p. 123.

in Scotland or Ireland the court shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant (r. 2). When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him (r. 6). It is provided in addition by Order 2 r. 4 that no writ of summons out of the jurisdiction shall be issued without the leave of the court or a judge, and by rule 5 of the same order that the writ and notice for service out of the jurisdiction shall be in one of the forms prescribed. As far as regards the power of the court to give leave to serve process on a foreign corporation outside the jurisdiction, there is no marked difference between these provisions and those of sections 18 and 19 of the Common Law Procedure Act of 1852. In determining the powers which the existing rules confer in this direction, however, the courts have come to a conclusion precisely opposite to that come to in *Ingate v. Lloyd Austriaco* (*supra*) as to the effect of the Common Law Procedure Act, basing their decision partly on the wider scope of the present rules, partly on a direct disapproval of *Ingate v. Lloyd Austriaco*. Immediately after the rules came into effect, it was decided both in the Queen's Bench Division and in the Exchequer Division that Order 11 r. 1 applied to actions against foreign corporations resident out of the jurisdiction. In *Westman v. Aktiebolaget &c. Sneckarefabrik*<sup>1</sup> leave was obtained under Order 2 r. 4 and Order 11 r. 1 to issue and serve a writ on a Swedish company which had no place of business in England. An application was made to set aside the writ and service. It was held (a) that in any case there was nothing contrary to the law of this country in permitting a writ to issue against a foreign corporation, whether it could be served or not. It might be that when the defendant company heard of the writ and the cause of action they would appear; or they might establish an office in England next year, and the writ, being kept alive and made available against it, might serve to defeat a plea of the Statute of Limitations: (b) that the order giving leave was wrong in directing service of the writ itself; notice of the writ only can be served on one not a British subject: (c) per Bramwell B. "subject to reconsideration" that the writ might be made available by serving notice of it out

<sup>1</sup> (1876) 1 Ex. D., p. 237.

of the jurisdiction. The reasons for this opinion were that before the Judicature Act (as has been seen) equity process might be served out of the jurisdiction on a foreign corporation, and that the Judicature Act did not intend to take away that power, but to put all the procedure on the same footing, repealing *Ingate v. Lloyd Austriaco*. That this opinion of Bramwell B. is correct is put beyond doubt by the concurrent case of *Scott v. Royal Wax Candle Company*<sup>1</sup>. There a writ was issued by leave against a Dutch corporation, and notice of the writ was served on it at its office at Amsterdam. A motion to set aside the writ and service was dismissed. "The language of Or. 11 r. 1," said Cockburn C.J., "seems to me large enough to include foreign corporations and to be as applicable to them as to foreign subjects<sup>2</sup>." It was said by Quain J. that "*Ingate v. Lloyd Austriaco* should be reconsidered if necessary, but it is not necessary in view of Or. 11 r. 1 (2)." The present condition of the law summarized in the rule stated at the head of this section is that in which it was left by the above cases.

The following are decisions on minor points of the practice concerning service of process on foreign corporations out of the jurisdiction.

A writ issued against a foreign corporation having no office in the United Kingdom must be in form No. 5 (writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction) or No. 6 (specially indorsed writ for service out of the jurisdiction) of Appendix A part 1 to the Rules of Court of 1883; and a writ in form No. 2 (specially indorsed writ, general form) issued against such a corporation was set aside<sup>3</sup>. Every writ issued against a foreign corporation for service directly or by notice must bear the address of the corporation. That is a necessary part of the writ, which without it is invalid; and it is a clear rule of practice in the writ office that when the address upon the writ is a foreign address, the writ is not issued without the leave of the court or a judge under Or. 2 r. 4<sup>4</sup>. An order for substituted service on a foreign corporation may be obtained as provided for by Or. 9 r. 2, Or. 10, and Or. 67 r. 6, but no substituted service can be made where

<sup>1</sup> (1876) 1 Q.B.D., p. 404.

<sup>2</sup> At p. 408.

<sup>3</sup> *Sedgwick v. Yedras Mining Company* (1887), W.N., p. 94.

<sup>4</sup> *The W. A. Sholten* (1887), 13 P.D., p. 8.



personal service would be impossible. Thus no order can be made for substituted service within the jurisdiction on a foreign corporation which is not present within the jurisdiction; as where, for instance, the defendants in an action were a Portuguese company which had no place of business within the jurisdiction. The plaintiffs obtained an order for substituted service on solicitors who had acted for the defendant company in an application in the matter, and on R. & Co., their agents at Swansea. But the service of the writ was set aside and the order was discharged on the grounds that no personal service was in this case possible within the jurisdiction<sup>1</sup>. And under the identical Irish Rules it has been held by the Irish court, for the same reasons, that an order made for substituted service on the defendants, who were an English newspaper company without a place of business in Ireland, by serving their agents for advertisements in Dublin, was bad and must be discharged<sup>2</sup>. In a proper case, a concurrent writ for service out of the jurisdiction may be issued under Or. 6 r. 2 against a foreign corporation. Thus where a Canadian company without a place of business within the jurisdiction, and its vice-president, who was present within the jurisdiction, were co-defendants in an action, concurrent writs were issued for service upon them outside and within the jurisdiction respectively<sup>3</sup>. The most common set of circumstances under which it is useful or necessary to issue a concurrent writ for service on a foreign corporation out of the jurisdiction is when leave to issue the writ for service out of the jurisdiction is sought on the grounds stated in Or. 11 r. 1 (g), *i.e.* that the foreign corporation is a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction. Thus in the case last mentioned the grounds of the application for leave to serve the writ out of the jurisdiction were that the Canadian company was a necessary and proper party to the action against the vice-president within Or. 11 r. 1 (g) and also that the cause of action was within Or. 11 r. 1 (e). It was held that part of the claim was

<sup>1</sup> *Société Industrielle et Commerciale des Métaux v. Companhia Portuguesa dos Minas de Huelva* (1889), W.N., p. 32; cp. *Worcester City and County Banking Co. v. Firbank Pauling & Co.* (1894), 1 Q.B., p. 784.

<sup>2</sup> *O'Connor v. The Star Newspaper Co. Ltd.* (1891), 30 L.R. Ireland, p. 1.

<sup>3</sup> *Manitoba and N.W. Land Co. Ltd. v. Allan and Manitoba and N.W. Railway Company of Canada* (1893), 3 Ch., p. 433.

within these rules, and part without, and the writ was allowed to stand subject only to an order that the plaintiffs were not entitled to relief in respect of that part of the claim which was without them. Again, a Canadian company had issued mortgage bonds and an action was brought by the holder against the company and others to enforce his charge. The other defendants were served within the jurisdiction, but the defendant company had a place of business and was resident at Toronto only. Leave was given to serve a concurrent writ in Canada; but this order was subsequently discharged, and the service set aside. On appeal the service and order were replaced. "The case," said Lindley M.R., "is of importance to those who lend money on debenture to Colonial companies, and to Colonial companies themselves. It will not be so easy to borrow if there is no redress here. The company were necessary and proper parties, because the validity of the charge was impeached<sup>1</sup>." This decision was approved in a case in which the plaintiffs, a Brazilian firm, had moved to enforce an equitable charge in the form of a debenture deed made in England on Brazilian property. The defendants were a Dutch company, which had no place of business in England, and which was trustee of the debenture deed; the receivers under the debenture deed, who were resident in England; and an English Ltd. company, which was the legal owner of the property subject to the charge. On a motion to discharge an order giving leave to serve the Dutch company out of the jurisdiction and to set aside the service, it was held that the Dutch company were necessary and proper parties within Or. 11 r. 1 (*g*), and that the service was authorised by the terms of the rule which did not extend the old jurisdiction, but enabled it to be exercised where it would not have been formerly by reason of defective rules<sup>2</sup>. To illustrate the extent of the old jurisdiction to order service out of the jurisdiction under the circumstances, and the fact that no change has been effected by the rules in its extent or the principles upon which it was exercised, the case of *Lewis v. Baldwin* may be referred to. The plaintiff had filed a bill against an Irish company and fifteen of its directors. The directors appeared, and an order was made giving leave to serve a subpoena to appear and answer

<sup>1</sup> *Bawtree v. Great N. W. Central Railway Co. and others* (1898), 14 T.L.R., p. 448.

<sup>2</sup> *Duder v. Amsterdamsch Trustees Kantoor* (1902), 2 Ch., p. 132.

the bill on the company in Ireland. On a motion to discharge the order, it was said by Lord Langdale M.R., "The rights of parties who are properly and exclusively subject to the jurisdiction, and who as to others submit to it, cannot, it is said, be determined without the appearance of the company now objecting to appear; and under the circumstances it seems to me that the company ought to appear<sup>1</sup>." On the other hand the converse of these decisions is also true. A foreign corporation cannot be served under Or. 11 r. 1 (g) unless the co-defendant within the jurisdiction is a substantial defendant, not merely one with a trifling interest added to acquire jurisdiction over the company. Furthermore, he must have been already served with the writ<sup>2</sup>. It may be mentioned here that the court has no jurisdiction to give leave to serve notices of orders or other proceedings in the winding up of a company on persons resident out of the jurisdiction<sup>3</sup>; but informal notices which are not intended to assert jurisdiction or to create an immediate liability, but only to give information, such as a notice to settle list of contributories, may be served<sup>4</sup> out of the jurisdiction<sup>5</sup>. The court has no jurisdiction to grant leave for service out of the jurisdiction of a summons, order or notice, except in circumstances in which there is jurisdiction under Order 11 r. 1 to grant leave for service of a writ of summons out of the jurisdiction<sup>6</sup>.

*Service on Irish and Scottish corporations and companies.*

28. Irish and Scottish corporations, except limited companies, when they appear before the English courts are, for purposes of service and otherwise, foreign corporations. Section

<sup>1</sup> (1848) 11 Beav. at p. 150.

<sup>2</sup> *Yorkshire Tannery Company v. Eglington & Co. Company* (1884), 33 W.R. 162.

<sup>3</sup> *In re Anglo-African S.S. Company* (1886), 32 Ch. D., p. 348.

<sup>4</sup> *In re Nathan* (1887), 35 Ch. D., p. 1.

<sup>5</sup> In the following cases leave to serve process on a foreign corporation out of the jurisdiction was given or refused; but the corporate nature of the foreign person was not relevant to the issues involved. *Bell & Co. v. Antwerp, London and Brazil Line* (1891), 1 Q.B., p. 103; *Robey v. Snaefell Mining Company* (1887), 20 Q.B.D., p. 152; *Hoerler v. Hanover & Co. Works* (1893), 10 T.L.R., pp. 22, 103; *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1903), 88 L.T., p. 490, and s.c. 90 L.T., p. 733; also the following Irish cases, *The Bank of Ireland v. Forbes* (1879), 6 L.R. Ireland, p. 19; *A.G. v. Drapers Company* (1894), 11 R., p. 185.

<sup>6</sup> *Aktiebolaget Robertsfors v. La Soc. An. des Papeteries de l'Aa.* (1910), 2 K.B., p. 727.

274 of the Companies (Consolidation) Act, 1908, which affects only companies incorporated outside the United Kingdom, has no application to them and service upon them within the jurisdiction is governed by the general principles stated above based upon the provisions of Or. 9 r. 8 and the decisions thereon. Thus in *Logan v. Bank of Scotland*<sup>1</sup> a writ was served upon the manager of the London branch of the defendant company, which was a Scottish bank incorporated by a statute which contained no provisions as to service of process upon it. Bruce J. made an order setting aside the service; but on appeal his order was discharged. It was held by the Court of Appeal that the Scottish company must be treated as a foreign company, and that on the authority of *Newby v. Von Oppen* and similar cases the service was good and within Or. 9 r. 8, and that the Citation (Scotland) Act (45 & 46 V. c. 77) and the Citation Amendment (Scotland) Act (34 & 35 V. c. 42) were not "statutory provisions regulating service of process" within the meaning of that rule, because they relate only to process issued from the Scottish courts. With this case may be contrasted that of *Palmer v. Caledonian Railway Company*<sup>2</sup>, in which the defendants were a railway company incorporated by Act of Parliament with the principal part of their line in Scotland and their head office at Glasgow, but a small part of their line in England, and a district traffic superintendent at Carlisle. The Companies Clauses Consolidation (Scotland) Act, 1845, was incorporated in the company's special act as to the Scottish part of their line. The action was for false imprisonment, and breach of contract, and the writ was served by leaving it at the office of the district traffic superintendent at Carlisle. On an application to set aside the writ and service it was held that the defendants were a Scottish company, that the Carlisle office was not a "principal office" within the meaning of sec. 135 of the Companies Clauses Consolidation (Scotland) Act, and that the provisions as to service contained in that section excluded the application of Or. 9 r. 8 to the company, since their "principal office" was where the control and management of the undertaking was carried on, *i.e.* at Glasgow.

<sup>1</sup> (1904) 2 K.B., p. 495.

<sup>2</sup> (1892) 1 Q.B., p. 823; overruling *Wilson v. The Caledonian Railway Company* (1850), 5 Ex., p. 822.

Service out of the jurisdiction upon Irish and Scottish corporations and limited companies is subject to special considerations, distinguishing them from other foreign corporations, introduced by Or. 11 of the Rules of Court, 1883. Order 11 r. 2 provides, in substance, that where leave is asked to serve a writ out of the jurisdiction under Or. 11 r. 1, if it shall appear that there may be a concurrent remedy in Scotland or Ireland, regard shall be had to the comparative cost and convenience of proceeding in England, or in the place of residence of the person sought to be served, and particularly in the case of small demands. The general principles upon which the court exercises its discretion under this rule need not be discussed here<sup>1</sup>; but it may be remarked that in the case of a Scottish or Irish company, one circumstance which is considered as relevant and material in considering comparative convenience is whether the company carries on business in England and has property here which could be sequestered<sup>2</sup>. The rule relates strictly to service out of the jurisdiction only. It does not apply where service is made within the jurisdiction, which is of right, and needs no leave; nor is it possible to imply from it any policy of the law restricting service on Scottish and Irish corporations within the jurisdiction<sup>3</sup>.

Or. 11 r. 1 (e) provides in effect that when a person sought to be sued is domiciled or ordinarily resident in Scotland or Ireland, leave to serve a writ upon him out of the jurisdiction cannot be given, if the application for leave is based upon the grounds referred to in that sub-section only, namely, that the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which, according to the terms thereof, ought to be performed within the jurisdiction. It will be seen that this rule differs from the last in being peremptory, and allowing the court no discretion. If, therefore, a corporation or company is domiciled or ordinarily resident in Scotland or Ireland, no leave to serve a writ upon it out of the jurisdiction can be obtained under the sub-section. This directly

<sup>1</sup> For a full discussion of the doctrine of *forum conveniens* see *Logan v. Bank of Scotland* (1906), 1 K.B., p. 141, discussed and followed in *Egbert v. Short* (1907), 2 Ch., p. 205.

<sup>2</sup> *In re Burland's Trade Marks* (1889), 41 Ch. D., p. 542.

<sup>3</sup> *Logan v. Bank of Scotland* (*sup.*) at p. 498.

raises the question, what is the domicile of a corporation, which has been discussed at length in its general aspects in the first part of this work, and also in relation to the general principles of our law. It is sufficient to notice here, that the application of the words of this rule "domiciled or ordinarily resident" to corporations has been discussed in *Jones v. Scottish Accident Insurance Company Limited*<sup>1</sup>. The defendants were a limited company whose registered office was in Scotland, and which had agencies and a chief office within the jurisdiction. They issued a policy through an agent within the jurisdiction to whom the premiums were paid. A claim was made upon the policy which they refused to pay. An application for leave to issue a writ for service in Scotland was refused on the grounds that the defendants were domiciled and ordinarily resident there, and not in England. "The first principle," said Pollock B., "arrived at in the early decisions was that a corporation dwells in the place where it carries on its business. Where does a corporation carry on its business? The ordinary guiding rule for the answer to that inquiry is that it carries on business in the place where its chief office is situate. If we decide that the head office is the place where the company is domiciled or resident we decide upon the same principle as previous cases." It will be clear from what has been said in the previous part of this work referred to above that this decision can be supported only if an "ordinary residence" be interpreted to mean something quite different from a "residence" and practically identical with a "domicile." It has been repeatedly held that the residence of a corporation is at any place of business of the corporation, which need not be its chief office or place of business, and that it may in consequence have several residences. The learned Baron's dictum that it carries on business in the place where its chief office is situate, and that the head office is the place where the company is domiciled or resident, is therefore distinctly misleading. Its domicile in the sense of its permanent home is no doubt at its chief or head office; but in the face of many decisions it cannot be said that its chief or head office is its only residence. The decision as it stands must, therefore, be taken to mean that in this rule the words "ordinary residence" mean something totally different from "residence," and do not in fact enlarge the effect of the

<sup>1</sup> (1886) 17 Q.B.D., p. 421.

word "domicile." Its practical effect is that a corporation can have only one "ordinary residence" within the meaning of the rule.

It is competent, as it has been seen, for a foreign company to contract to accept service in a manner in which service could not otherwise have been effected upon it. This principle applies to Scottish and Irish companies as much as to other foreign companies<sup>1</sup>, with this reservation, that it has no application to the circumstances governed by Or. 11 r. 1 (*e*). A company domiciled or ordinarily resident in Scotland or Ireland cannot validly agree that a writ for breach of contract arising within the jurisdiction may be served on it in Scotland. Such an agreement would not authorise the court to direct service upon it. To do so in direct contravention of the rule would be to add to the jurisdiction of the court, which cannot be done by private agreement<sup>2</sup>.

Scottish and Irish limited companies registered under the Companies Acts, as distinguished from other Scottish and Irish corporations, occupy a special position as to service of process, differing from that of foreign companies. Their status, as it has been seen, differs from that of other Scottish and Irish corporations, in that they are corporations of the United Kingdom, and not of England, Scotland, or Ireland in particular. Since they are not foreign in any part of the United Kingdom, they should not logically be subjected to the rules which govern service on foreign corporations. That logical deduction has indeed never been authoritatively approved, but in fact they are not so subjected. Section 116 of the Companies (Consolidation) Act, 1908<sup>3</sup>, regulates the manner of serving process upon all companies registered under that Act. It provides that "a document may be served on a company by leaving it at or sending it by post to the registered office of the company." This constitutes within the meaning of Or. 9 r. 8 "a statutory provision regulating service of process" on Scottish and Irish limited companies, and thus prevents the application to them of the general provisions of that rule, by which service on other

<sup>1</sup> *Montgomery v. Liebenthal* (1898), 1 Q.B., p. 487, approving *Tharsis Sulphur Co. v. Société Industrielle des Métaux* (*sup.*).

<sup>2</sup> *British Waggon Co. v. Gray* (1896), 1 Q.B., p. 35.

<sup>3</sup> Formerly § 62 of the Companies Act, 1862.

Scottish and Irish corporations and foreign corporations in general is governed. The result is that a Scottish or Irish limited company cannot be served within the jurisdiction even though it carries on business and has a place of business here. This was decided in *Wood v. Anderston Foundry Company*<sup>1</sup>. The defendants were a limited company with their registered office at Glasgow and branch works in England. A writ was served on the manager of the English works; but it was held that the writ must be served in the manner provided by sec. 62, and that no choice was given to the plaintiff to serve it otherwise. So also in *Watkins v. Scottish Imperial Insurance Company*<sup>2</sup>, where the defendants were a limited company with their registered office at Glasgow. A writ was served upon the manager of a head branch office which they had in London. The service was set aside, on the grounds that sec. 62 is expressly preserved by the exception in Or. 7 r. 8. In this case it was also said that the defendants could not be served in England at all, since they were ordinarily resident in Scotland, and the cause of action fell within Or. 11 r. 1 (e). It is always necessary therefore to obtain leave to serve process upon a limited company which has its registered office in Scotland or Ireland.

### **Liquidation.**

*A foreign joint stock company which has a branch office in the United Kingdom may be wound up under the Companies (Consolidation) Act, 1908.*

29. English legislation is primarily territorial, but it is no departure from that rule to say that a foreigner coming and trading here is subject to our laws although not actually domiciled here<sup>3</sup>. As early as 1850 Knight Bruce V.C. assumed that an English court had power to order the winding up under the Joint Stock Companies Winding Up Act, 1848, and the Joint Stock Companies Winding Up Amendment Act, 1849, of an unincorporated joint stock banking company established in India, which was alleged to carry on business also in London<sup>4</sup>; but he declined to make

<sup>1</sup> (1888) 36 W.R. 918.

<sup>2</sup> (1889), 23 Q.B.D. 285.

<sup>3</sup> per Halsbury L.C. in *Cooke v. The Charles A. Vogeler Co.* (1901), A.C., p. 102.

<sup>4</sup> *In re Union Bank of Calcutta* (1850), 19 L.J. Ch., p. 388. Under the same acts it was also held that the courts had jurisdiction to wind up an unincorporated company



the order for reasons of convenience. Sections 267 and 268 of the Companies (Consolidation) Act, 1908 (formerly § 199 of the Companies Act, 1862), provide that any company consisting of more than seven members and not registered under the Act may be wound up under the Act. It was held *in re Commercial Bank of India*<sup>1</sup> that foreign companies were included in this provision, so long as they were rendered subject to the jurisdiction of the courts by having a branch office in this country. The bank in question was incorporated by resolution and registration under Act 19 of 1857 of the Legislative Council. Its principal place of business was in India, but it had an agent and a branch office in England. This decision was followed *in re Matheson Brothers Limited*<sup>2</sup>, where it was held that the court had jurisdiction to wind up a joint stock company formed and having its principal place of business in New Zealand, which had a branch office, agents, assets, and liabilities in England. "The court," said Kay J., "has jurisdiction to make a winding up order on a petition of this kind, otherwise there might be no means by which the English creditors could obtain payment of their debts. This company comes within the provisions of the 199th section—the dissolution of a company is brought about by a separate order of the court, and it by no means follows that because the court has no power to make an order to dissolve a foreign company, that it has no power to make an order to wind it up and as a matter of fact wound up companies seldom are dissolved." In the latter passage the learned judge disposes of the artificial argument that a corporation being a creature of law and existing only in the contemplation of the law, its existence can be terminated by that law only to which it was due. So also *in re Jarvis Conklin Mortgage Company*<sup>3</sup> it was held by Romer J.

formed in England in order to establish a foreign company abroad, and carry on business abroad through the foreign company: *ex parte Turner in re the Madrid and Valencia Railway Company* (1850), 2 Mac. and G., p. 169, s.c. (1849), 3 De G. and S., p. 127; *in re the Dendre Valley Railway and Canal Company* (1850), 19 L.J. Ch., p. 474; *in re The German Mining Company* (1854), 4 De G.M. and G., p. 919; *in re Mexican and South American Mining Company* (1850), 26 Beav., p. 177; also *ex p. Wolesey in re Great Western Railway Company of Bengal* (1849), 3 De G. and S., p. 101. But in these cases it was the English partnership, not the foreign company, that was wound up.

<sup>1</sup> (1868) L.R.C. Eq., p. 517.

<sup>2</sup> (1884) 27 Ch. D., p. 225.

<sup>3</sup> (1895) 11 T.L.R., p. 373.

that he would have jurisdiction to wind up a company incorporated in the state of Missouri which had a branch office in this country, but it was also held that the desire to obtain the sanction of the court for an arrangement under the Act of 1870 was not a sufficient reason for granting an order<sup>1</sup>.

*In re Lloyd Generale Italiano*<sup>2</sup> it was held conversely that the court had no jurisdiction under sec. 199 to wind up a foreign company which has carried on business here by means of agents, but which has no branch office of its own here. The company in question was an Italian *società anonima*, and it was said by Pearson J. in refusing an order: "I am decidedly of opinion that the Act is confined to English companies and foreign companies carrying on business in England with, so to speak, a residence of their own, a branch office, in this country."

A colonial company is for purposes of winding up on the same footing as a foreign company. This is exemplified in the above cases. It follows also from the case of *New Zealand Loan and Mercantile Agency Company Limited v. Morrison*<sup>3</sup>, in which it was said by Lord Davey in the Privy Council that "it is impossible to contend that the Companies Acts as a whole extend to the colonies or are intended to bind the colonial courts. The colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies and thereby overrule, qualify or add to their own legislation on the same subject."

The part of the United Kingdom in which a foreign company should be wound up, and the court having jurisdiction in the winding up, are determined by the following provisions of the Companies Acts. Sub-section 1 of sec. 268 of the Consolidation Act (formerly s.s. 1 of § 199 of the Act of 1862) provides that an unregistered company shall "for the purposes of determining the court having jurisdiction in the matter of the winding up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom

<sup>1</sup> Cp. also *in re Australian Joint Stock Bank* (1897), W.N., p. 48.

<sup>2</sup> (1885) 29 Ch. D., p. 219.

<sup>3</sup> (1898) A.C. p. 349 at p. 355.

where it has a principal place of business; and the principal place of business situate in that part of the United Kingdom in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company." Since foreign companies are unregistered companies within the meaning of the section, they are governed by these provisions, and it is by them that the *locus* of their winding up within the United Kingdom and the court having jurisdiction therein are determined. Authority for the proposition may be found in a case decided upon section 32 s.s. 3 of the Companies Winding Up Act, which provided that for the purposes of the Act, "the expression 'registered office of a company' shall include, in the case of an unregistered company, any place which in pursuance of section 199 of the Companies Act, 1862, is to be deemed the registered office of the company for the purpose of the winding up thereof," a provision which is not included in the Consolidation Act, and is therefore repealed<sup>1</sup>. The case is that of *in re* Mercantile Bank of Australia<sup>2</sup>, a Victorian company with a branch office in London. It was said by North J. "with regard to sub-section 3 of sec. 32, I think the Act does apply to this company." If sub-section 3 of sec. 32 of the Act of 1890 applied to foreign companies *a fortiori* sec. 268 sub-section 1 of the Act of 1908 applies to them also.

It is evident from the wording of section 267 that there is no jurisdiction to wind up under the Act a foreign company if at the date of the petition it consists of not more than seven members. Apparently, however, if the number of members is less than eight, an action will lie<sup>3</sup>. The members need not necessarily be shareholders<sup>4</sup>.

The circumstances under which an unregistered company may be wound up are specified by sub-section 3 of section 268 of the Act, but by section 273 such provisions are cumulative with the other provisions of the Act in this respect.

A foreign company which was never duly incorporated

<sup>1</sup> 6th Schedule, Part 1, of the Act. The remainder of the clause is embodied in the Act as § 131, s.s. (8).

<sup>2</sup> (1892) 2 Ch. at p. 208.

<sup>3</sup> *In re* Bolton Benefit Loan Society (1879), 12 Ch. D., p. 679; South London Fishmarket Co. (1888), 39 Ch. D., p. 324.

<sup>4</sup> South London Fishmarket Co. (*sup.*). Bowley's Contracts (1895), 1 Ch., p. 663.

cannot be wound up; and whether it was duly incorporated or not is a question for its personal law<sup>1</sup>.

*When a foreign company is being wound up both here and in its domestic state, the foreign winding up is treated by the court as the principal, and the English winding up as ancillary to the foreign.*

30. *In re Matheson Brothers Limited (sup.)* where proceedings to wind up the company were already pending and a liquidator had been appointed in New Zealand, it was said by Kay J.<sup>2</sup>: "This court upon principles of international comity would have great regard to the New Zealand winding up, and would be influenced thereby," and later, "I am justified in securing the English assets till I see that proceedings are taken in the New Zealand liquidation to make the English assets available *pari passu* with the creditors in New Zealand." This case was followed *in re Commercial Bank of South Australia*<sup>3</sup>. The bank was incorporated and carried on business in South Australia and had a branch office in London. On petition to the English court to wind it up, a provisional liquidator was appointed to take possession of and collect the English assets. A provisional liquidator was then appointed in Australia. On further hearing it was decided that the jurisdiction to wind up the company was not affected by the subsequent proceedings in Australia. A winding up order was made accordingly, the winding up to be ancillary to that in Australia, and the official liquidator to have no more powers than those granted to the provisional liquidator. "I think," said North J.<sup>4</sup>, "that the winding up here will be ancillary to a winding up in Australia; and if I have the control of the proceedings here I will take care that there shall be no conflict between the two courts, and I shall have regard to the interests of all the creditors and all the contributories, and shall endeavour to keep down the expenses of the winding up as far as is possible; the liquidator ought not to act, without the special direction of the judge in chambers, except for the purpose of getting in the English assets and settling a list of the English

<sup>1</sup> *In re The Imperial Anglo-German Bank* (1872), 26 L.T. N.S., p. 229.

<sup>2</sup> At p. 230.

<sup>3</sup> (1886) 33 Ch. D., p. 174.

<sup>4</sup> At p. 178, as to the conduct of proceedings in the winding up, cp. *in re Commercial Bank of South Australia* (1887), 36 Ch. D., p. 523.

contributories." So also *in re* Federal Bank of Australia<sup>1</sup>, an order was made to wind up compulsorily a company registered in Victoria which had carried on business in England, which was being voluntarily wound up in Victoria, and compulsorily in South Australia; V. Williams J. said that "assuming that the principal liquidation would be in Australia, the duties of the liquidator in this country would be merely ancillary,—the powers of the English liquidator would be limited to taking possession of, collecting and protecting English assets, with liberty to apply." In the case of the North Australian Territory Company Limited v. Goldsbrough Mort & Co. Limited<sup>2</sup>, the matter is contemplated from the opposite point of view, the principal winding up being in England and the ancillary winding up in Australia. The plaintiffs were registered under the Company Acts, and had their registered office and their principal place of business in London. They passed a resolution for voluntary winding up in England and their liquidators in this winding up brought the action against the defendants for cancellation of an agreement. The defendants were a company incorporated under a Victorian statute, carrying on business in that colony and in England. They moved to set aside the writ on the grounds that a compulsory winding up order had been made on the plaintiffs in South Australia, that this superseded the voluntary winding up in England, and that the English liquidators had in consequence no authority to bring the action. The motion was dismissed. Speaking of the Australian order Kay J. said: "according to our law such an order might possibly be made, but in the case of an Australian company it would be confined to the property of the company existing in this country, and would only be by way of assisting a winding up going on or contemplated in Australia. It would only be to protect the property in this country and the creditors. The Australian courts have no jurisdiction to wind up an English company here. The winding up in this country must go according to the law of this country. Therefore any order made by the Australian courts for winding up in Australia would be merely ancillary." The rules laid down in the above cases were approved and explained *in re* English Scottish and Australian Chartered

<sup>1</sup> (1893) 62 L.J. Ch., p. 561.

<sup>2</sup> (1889) 61 L.T. N.S., p. 716.

Bank<sup>1</sup>, in which it was said by V. Williams J.<sup>2</sup>: "one knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicile of the company in liquidation; let the court of the country of domicile act as the principal court to govern the liquidation, and let the other courts act as ancillary as far as they can to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation—the desire to act as ancillary to the court where the main liquidation is going on—will not ever make the court give up the forensic rules which govern the conduct of its own liquidation; nor will the English court act as the mere agent of the foreign court; it will investigate matters for itself<sup>3</sup>."

Summarising the above decisions, we obtain the following rules for the conduct of a simultaneous winding up. The winding up in the country in which the company is domiciled or domestic is the principal, others are ancillary. The purpose of the ancillary winding up is to secure the local assets, and the rights of the local creditors: and the duties of the liquidators accordingly are to collect the local assets, to settle a list of local contributories, and also, it would seem, to determine the claims of local creditors. In so doing, the court controlling the ancillary winding up should avoid conflict with that controlling the principal winding up, but on the other hand the conduct of proceedings in the ancillary winding up must be governed by the *lex fori* exclusively.

Sections 120 and 294 of the Companies (Consolidation) Act, 1908<sup>4</sup>, as to arrangements between creditors, which provide that a compromise in a winding up agreed to by a majority of creditors and sanctioned by the court is to be binding on the minority, are a part of our general law as to winding up which is applicable in the winding up of a foreign company, and may be employed to give effect to a scheme of compromise already arranged in a simultaneous winding up abroad<sup>5</sup>. Proceedings under the Act will differ in character according to whether the

<sup>1</sup> (1893) 3 Ch., p. 385.

<sup>2</sup> At p. 394.

<sup>3</sup> *In re* Queensland Mercantile Agency Co. Ltd. (1888), 58 L.T. per North J. at p. 879.

<sup>4</sup> Formerly the Joint Stock Companies Arrangement Act, 1870.

<sup>5</sup> *e.g.* Dane v. The Mortgage Insurance Co. Ltd. (1894), 1 Q.B. at p. 55.

winding up here is the principal, or ancillary. If it is the principal, the court here is bound to make provision for creditors in all parts of the world to come in and be heard if they think fit; and since those who are abroad cannot expect to come and be present personally, they must be allowed to vote by proxy. This was the course adopted in *re* English Scottish and Australian Chartered Bank<sup>1</sup>; where V. Williams J. made an order that Australian creditors of the bank which was being wound up in England, might meet and consider the scheme in Australia and record their votes in London by cabling their assent to a form of proxy sent to Australia. But if the winding up is ancillary, only the creditors in the country in which the winding up is proceeding are entitled to be heard at a meeting there<sup>2</sup>. A scheme of arrangement sanctioned by the court under the Act is not, however, binding on a colonial or a foreign creditor who has not assented thereto; and it is no defence to an action for the full amount of his claim in the colonial or foreign court. As to colonial creditors this rule is supported by the decision of the Privy Council in *The New Zealand Loan and Mercantile Agency Company Ltd. v. Morrison*<sup>3</sup>, which has already been referred to. It is there established by deduction from general principles that the Company Acts as a whole do not apply to the colonies. There is no direct authority for the application of the rule to foreign creditors; but it can be supported on general principles<sup>4</sup>.

*Scottish and Irish registered companies can be wound up in that part only of the United Kingdom in which they are registered; but the jurisdiction to wind up other Scottish and Irish corporations is co-extensive with that to wind up foreign corporations in general.*

Companies registered in Scotland and Ireland are, as has been said, corporations of the United Kingdom. They are not foreign companies, nor are questions relating to their winding up

<sup>1</sup> (1893) 3 Ch., p. 385.

<sup>2</sup> *In re* Queensland National Bank (1893), W.N. per V. Williams J. at p. 128.

<sup>3</sup> (1898) A.C., p. 349; confirming the Supreme Court of Victoria.

<sup>4</sup> For a discussion of this question, which is not relevant to the present subject, the reader is referred to Buckley on the Companies Act (1897), p. 633.

governed by the same principles. A company registered under the Companies Act must have a registered office (§ 62): its memorandum of association must specify in which kingdom that office is to be situated (§§ 3, 1 (2); 4, 1 (2); and 5, 1 (2)). It can be registered in England, Ireland, or Scotland, but at that registration office only which is within the kingdom in which by its memorandum its registered office is declared to be established (§ 15). A company cannot be registered in Ireland, for instance, unless its registered office is in Ireland. The kingdom in which a company is registered, and that in which its registered office is situated, must always be the same.

Section 131 s.s. 1 of the Companies (Consolidation) Act, 1908, provides that the court having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and the County Courts. Section 134 of the Act provides that the court having jurisdiction to wind up companies registered in Ireland shall be the High Court, provided that the High Court may direct all subsequent proceedings to be held in the Court of Bankruptcy. Section 135 of the Act provides that the court having jurisdiction to wind up companies registered in Scotland shall be the Court of Sessions in either division thereof<sup>1</sup>, with power to remit to a permanent Lord Ordinary.

The jurisdiction thus established in each of the three courts is exclusive. The English courts having jurisdiction in winding up have no jurisdiction to wind up a company registered in Ireland or Scotland. The fact that any such company carried on business here at a branch office would not give the English courts jurisdiction; which marks the difference in status between Scottish and Irish companies and foreign companies<sup>2</sup>. Scottish and Irish companies not registered under the Companies Act have not the status of companies of the United Kingdom. Their status is similar to that of foreign companies; and as unregistered companies the *locus* of their winding up and the court having jurisdiction therein is determined by s.s. 1 of § 268

<sup>1</sup> Thus setting at rest the doubt whether § 81 of the Companies Act, 1862, which originally conferred this jurisdiction on the Court of Sessions, was repealed by the schedule to § 1 of the Statute Law Revision Act, 1893, or preserved by § 1 of that Act.

<sup>2</sup> *In re* Scottish Joint Stock Trust (1900), W.N., p. 114.



of the Act, in the manner already described in connection with foreign companies.

*Orders made in the winding up of a company in Ireland or Scotland can be enforced in England, and vice versa.*

31. There being no jurisdiction to order an ancillary winding up in England of a company being wound up in Scotland or Ireland, or vice versa, were there no special enactments dealing with the matter, there would be no means of making the winding up of a registered company effective in parts of the United Kingdom other than that in which the company was registered. But s.s. 1 of § 180 of the Companies (Consolidation) Act, 1908<sup>1</sup>, provides such a means, by enacting that orders made in the winding up of a company in Ireland and Scotland are to be enforced in England, and vice versa. It provides that "any order made by the court in England for or in the course of winding up a company shall be enforced in Scotland and Ireland in the courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland, and in the same manner in all respects as if the order had been made by those courts"; and sub-section 2 provides for the enforcement in England and Ireland of orders made in Scotland, and in England and Scotland of orders made in Ireland. When it is required to enforce under the section an order made in Scotland or in Ireland, it must be made an order of the court which would have had jurisdiction to wind up the company if it had been registered here. It was held, for instance, that an order made by the Court of Bankruptcy in Ireland under the special power given to that court by § 81 of the Companies Act, 1862<sup>2</sup>, must when it is to be enforced in England be made an order not of the Bankruptcy Court but of the Court of Chancery<sup>3</sup>.

Sub-section (3) of § 180<sup>4</sup> of the Act deals with the manner in which the order of one court is to be made the order of another, enacting that when it is required to enforce the order of one court in another, the production of an office copy of the

<sup>1</sup> Formerly § 122 of the Companies Act, 1862.

<sup>2</sup> Now § 134 of the Companies (Consolidation) Act, 1908.

<sup>3</sup> *Hollyford Copper Mining Co.* (1869), L.R. 5 Ch., p. 93, cp. *in re Glasgow Bank* (1880), 14 Ch. D., p. 628; *in re Scottish Pacific Co.* (1886), W.N., p. 63.

<sup>4</sup> Formerly § 123 of the Companies Act, 1862.

order to the proper officer is sufficient evidence of the making of the order, and that thereupon the court "shall take the requisite steps in the matter for enforcing the order—in the same manner as if it had been made by that court."

These sections enable the court in which a winding up is proceeding to restrain, in a proper case, a creditor from proceeding against the assets of the company in any part of the United Kingdom. It has always had jurisdiction to do so in any case, but it could not exercise that jurisdiction against a foreigner not resident in England, because it had no power of enforcing its decree. The sections under discussion provide a means of enabling it to enforce its decree against creditors resident in Scotland and Ireland, and thus enable it in this case to exercise its jurisdiction effectively. This was decided *in re* International Pulp and Paper Co.<sup>1</sup> A registered company was being wound up in the Chancery Division. It had carried on part of its business in Ireland, and had property there. One who was not within the jurisdiction of the English court brought a suit against the company in the Irish court for specific performance of a lease. The official liquidator moved to restrain him. An injunction was granted, Jessel M.R. saying<sup>2</sup>, "I agree if any creditor in Turkey, Russia or other purely foreign country were to bring an action, although desirable to make him come in, yet the court cannot restrain, for want of power—not from want of will or provisions in the Act. The 122nd section gives authority to enforce power over the creditor in Ireland." So *in re* Herman Loog<sup>3</sup>, a Scottish solicitor who was employed in getting in the Scottish assets of a company being wound up in England was restrained from prosecuting an action against the official liquidator in the Scottish courts for taxation and payment of his costs out of the Scottish assets. *In re* Thurso New Gas Company<sup>4</sup>, the court under similar circumstances allowed a Scottish creditor to continue an action for damages to judgment, since that was a proper and convenient mode of ascertaining his claim, but on terms that he was to get no priority over other creditors.

<sup>1</sup> (1876) 3 Ch. D., p. 549.

<sup>2</sup> At p. 597.

<sup>3</sup> (1887) 36 Ch. D., p. 502; cp. *in re* Middlesborough Firebrick Company (1885), 52 L.T., p. 98, and Wanzer Ltd. (1891), 1 Ch., p. 305.

<sup>4</sup> (1889) 42 Ch. D., p. 486.

In the Irish case of *in re* Belfast Shipowners Company Limited<sup>1</sup>, the Irish court under the supervision of which an Irish company was being wound up restrained a petitioner in the winding up who was a British subject carrying on business at Liverpool from proceeding to attack the property of the company in Massachusetts. It was said by Chatterton V.C., whose judgment was affirmed on appeal, that an effectual order might be made because of § 122 of the Companies Act, 1862. It appears that § 180 of the Consolidation Act enables the court controlling a winding up to enforce against a resident in another part of the United Kingdom the jurisdiction *in personam* which could formerly be exercised only against a resident within the jurisdiction of the court, *i.e.* in the same part of the United Kingdom.

*The appointment of a liquidator of a company in a foreign liquidation does not affect the title of a judgment creditor who has obtained execution against the company in England.*

32. This rule was laid down in *Levasseur v. Mason and Barry*<sup>2</sup>. The rights of the judgment creditor, it was said, are to be determined by English law and it would therefore make no difference that, according to the law of the country in which the liquidation was taking place, the appointment of the liquidator dated back to before the date of the execution. In the case in question the execution was equitable execution by the appointment of a receiver; but neither, it was pointed out, could this affect the general principle, because the effect of an order for equitable execution is to decide that the judgment creditor is entitled to the property in question at the date of the order, subject to the prior interest of some third party.

Conversely, the presentation of a petition for winding up and the making of a winding up order by the English court does not affect the validity of a charge which has come into existence according to foreign law before the English winding up, although judgment was not obtained in the foreign court till a later period<sup>3</sup>.

<sup>1</sup> (1894) 1 I.R., p. 321.

<sup>2</sup> (1891) 2 Q.B., p. 73; *s.c.* *Mason and Barry Ltd. v. La Société Industrielle et Commerciale des Métaux* (1889), 37 W.R., p. 735.

<sup>3</sup> *Minna Craig S.S. Company v. Chartered Mercantile Bank of India, London and China* (1897), 1 Q.B., p. 55.

*A foreign company is not released from liabilities under contracts made and to be performed in England by a discharge in a foreign liquidation.*

33. This rule was laid down in *Gibbs and Sons v. La Société Industrielle et Commerciale des Métaux*<sup>1</sup>, a case which has been discussed above<sup>2</sup>.

### Revenue.

*A foreign company or other corporation may be a person residing in the United Kingdom for purposes of income tax.*

34. Under the first paragraph of Schedule D of § 2 of the Income Tax Act of 1853, income tax is made payable in respect of "profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person resident in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be carried on in the United Kingdom or elsewhere."

It is now fully established that a foreign company or other corporation can be resident within the United Kingdom within the meaning of the schedule. The rule rests upon the authority of the cases referred to in the following pages.

*A company or corporation is resident in the United Kingdom for the purposes of income tax which has its centre of administrative business in the United Kingdom, wherever it may have been incorporated or registered.*

35. This rule has already been dealt with at some length in discussing the residence of a foreign company from the general standpoint<sup>3</sup> and it will be necessary here to refer briefly only to the principal authorities on which it is based. The highest and best authority for the proposition is the case of *De Beers Consolidated Mines Ltd. v. Howe*<sup>4</sup>. The plaintiff company was incorporated and registered in Griqualand West in the colony of the Cape of Good Hope. Its business consisted in mining diamonds and selling them to a London Syndicate, on contracts

<sup>1</sup> (1898) A.C. p. 399.

<sup>2</sup> Ante, p. 181.

<sup>3</sup> Ante, p. 198.

<sup>4</sup> (1905) 2 K.B., p. 612; s.c. H.L. (1906), A.C., p. 455.

made in London, for delivery at Kimberley. General meetings of the company were held at Kimberley; and its control was vested in three life governors, of whom two resided in the United Kingdom, and 16 directors, of whom nine resided in the United Kingdom. Meetings of directors were held weekly at Kimberley and London and the technical management was conducted and the general accounts were kept at Kimberley; but in fact the majority of the directors were always in London, and the London meeting controlled the policy of the company, and had never been overruled by the Kimberley meeting. It was held by the House of Lords, confirming the Court of Appeal and the court of first instance, that the company was resident in London. The decision followed and strengthened that in *Goerz & Co. v. Bell*<sup>1</sup> which was the first case in which a company registered abroad was held to be resident here for the purposes of Income Tax. There the company was registered at Pretoria under the laws of the South African Republic. Its business consisted in dealings in shares all over Europe. All transactions of importance were controlled by board meetings of directors in London. The chairman and three directors resided in England, five directors resided on the continent and attended the London meetings, and one director resided at Johannesburg. The accounts were made up and the dividends were authorised in London. It was held that the company resided in London within the meaning of the schedule, on the grounds that the London office was in fact the head office of the company. In the *Cesena Sulphur Company Ltd. v. Nicholson*, and the *Calcutta Jute Mills Company Ltd. v. Nicholson*<sup>2</sup> the circumstances differed from those in the preceding cases, in that both the appellant companies were registered under the Companies Acts. Their undertakings were abroad, in Italy and Bengal respectively, where all their profits were earned: but their affairs were controlled by boards of directors meeting in the United Kingdom. It was held that both resided in the United Kingdom. The grounds of the decision were that the companies were under the control of the English directors, to whom the foreign directors and agents were subordinate.

<sup>1</sup> (1904) 2 K.B. 136.

<sup>2</sup> (1876) 1 Ex. D., p. 428.

*A foreign company or other corporation resident in the United Kingdom the trade of which is wholly carried on in the United Kingdom is liable to assessment for income tax, in respect of the whole of its annual profits.*

36. This is the effect of the first paragraph of Schedule D of the Income Tax Act of 1853 quoted above. The application of the enactment is illustrated by the cases of *De Beers & Co. v. Howe and Goerz v. Bell*, referred to in the last section, in which the substance of the decisions was that the companies concerned were resident in England, and also exercised the whole of their trade here, and that the whole of their profits was therefore liable to assessment. So also in *Alexandria Water Company v. Musgrave*<sup>1</sup> where an English company carried on business at Alexandria, where all its profits were earned, but it was admitted that the company was resident in England, it was held that the company was rightly assessed in respect of the whole of its profits. The decision in *Cesena Sulphur Company Ltd. v. Nicholson and Co.* (*sup.*) was to the same effect. The latter case has been questioned in subsequent decisions on the grounds that though the companies were resident in the United Kingdom their trade was not wholly carried on here, and that they should therefore rather have been assessed under the following rule. The question, however, of where a company exercises its trade, apart from the question of where it resides, can be more conveniently considered when dealing with the assessment of non-resident companies.

*A foreign company or other corporation resident in the United Kingdom if its trade were wholly carried on abroad would be liable to assessment for income tax in respect of that part of its annual profits only which was received in this country.*

37. The first paragraph of Schedule D of the Income Tax Act of 1853 has been judicially construed in this manner in cases relating to natural persons: and in view of those decisions it may be said that if a company resident in the United Kingdom were able to carry on its trade wholly abroad, it would not be liable to assessment on the whole of its profits, but on that part of them only which it actually received in this country. The duty

<sup>1</sup> (1883) 11 Q.B.D., p. 174: distinguished on an immaterial point in *Gresham Life Assurance Society v. Styles* (1892), A.C., p. 309.

would then be computed under the 5th case of s. 100 of 5 & 6 Vict. c. 35, as "charged in respect of possessions in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions" and to be computed on "the actual sums annually received in Great Britain." The general principle was established in relation to natural persons by the case of *Colquhoun v. Brooks*<sup>1</sup> where the trade in question was that of an Australian firm of which the respondent was a partner. The business of the partnership was wholly controlled and carried on in Australia, but the respondent resided in the United Kingdom. It was held that he was liable to income tax in respect of so much only of the profits of the trade of the partnership as were received in the United Kingdom. Lord Herschell, distinguishing *Cesena Sulphur Company Ltd. v. Nicholson* (*sup.*) said that the decision there turned principally on where the companies resided and that the consideration as to where the trade of the companies was exercised was not present to the mind of the court<sup>2</sup>. The learned judge appears to have been of opinion that if that matter had been taken into consideration, the true decision in the case would have been that the whole trade of the companies was exercised abroad, and that they were liable, not in respect of their whole profits, but of that part of them only received in this country. This view however is not reconcilable with subsequent cases in which it has been held that the trade of a company is exercised in part at least wherever its affairs are controlled. This was the substance of the decision in *San Paulo Brazilian Railway Company v. Carter*, which is dealt with at length in the ensuing section. But if that be so, since a company which is controlled here is, as has been seen, resident here, a company cannot be resident here without partly at least exercising its trade here; and it would then follow that the rule stated at the head of this section could have no practical application. In view of Lord Herschell's words, the rule may be stated as having a hypothetical application to foreign companies; but it is difficult in view of *San Paulo Brazilian Railway Company v. Carter* to see how any company can ever take advantage of it.

<sup>1</sup> (1889) 14 A.C., p. 493, not following the *Imperial Continental Gas Association v. Nicholson* (1877), 37 L.T. N.S., p. 717.

<sup>2</sup> At p. 510, see also *London Bank of Mexico Ltd. v. Apthorpe* (1891), 1 Q.B. at p. 388; and *C.A.* (1891), 2 Q.B., p. 378.

Before the decision in *San Paulo Brazilian Railway Company v. Carter* an attempt was made to find a case in which the rule could be applied to a company, in a state of affairs of a special nature not infrequent in company practice, that of an English company formed to control and carry on business through a foreign company. Such were the circumstances which the court had to consider in the concurrent cases of *Bartholomay Brewery Company (of Rochester) Ltd. v. Wyatt* and *Nobel Dynamite Trust Ltd. v. Wyatt*<sup>1</sup>. The Brewery Company was formed to acquire breweries in the State of New York, and to meet the requirements of the local laws an American corporation was formed to own and manage the breweries. All the shares in the American corporation were owned by the English company, and dividends were declared by the American corporation under the direction of the English company. Dividends for American shareholders were retained in America and distributed there directly. It was held that the business was wholly carried on abroad; and that according to the rule established in *Colquhoun v. Brooks* the English company was not liable for income tax upon the dividends retained in America. The second case was that of an English registered company having its offices in London, formed to acquire shares in companies trading in England and Germany. A similar decision was given as to German dividends not received in England.

After the decision in *San Paulo Brazilian Railway Company v. Carter* that a company exercises its trade wherever it is controlled, the authority of the above decisions was much impaired. Mr Justice Wright, himself a party to the decisions, treated them as overruled<sup>2</sup> and they have been disregarded, and *San Paulo Brazilian Railway Company v. Carter* followed, in several later cases, dealt with more fully in the following section. We may say therefore that the case of a foreign company resident here which carries on its trade wholly abroad is an impossible one: and that the phrase contains in fact a contradiction in terms. The rule may however usefully be stated in a

<sup>1</sup> (1893) 2 Q.B., p. 499; see also *Gresham Life Assurance Society v. Bishop* (1901), 1 Q.B. 153; and *Norwich Union Fire Insurance Co. v. Mayee*, 3 Tax Cases 457.

<sup>2</sup> See *Apthorpe v. Peter Schoenhoven Brewery Co.* (1898), 14 T.L.R., p. 370; and *St Louis Brewery Ltd. v. Apthorpe* (1898), 15 T.L.R., p. 112, per Wills J. at p. 113.



hypothetical manner to show the relation between foreign companies and the general law relating to income tax<sup>1</sup>.

*A foreign company or other corporation resident in the United Kingdom the trade of which is exercised partly in the United Kingdom and partly abroad is liable to assessment for income tax on the whole of its profits wherever received.*

38. This rule also is the result of judicial interpretation of paragraph 1 of Schedule D. If a foreign company resides in this country and exercises its trade partly here and partly abroad, then it is liable to assessment on the whole of its profits whether received here or not, the duty being computed under the first case of s. 100 of 5 & 6 Vict. c. 35. The rule is based in the first place upon the case of *London Bank of Mexico and South America Ltd. v. Apthorpe*<sup>2</sup>. The bank, an English registered company, carried on business in London with branches abroad. The company was controlled by directors in London, where its business was directed and managed. Of the profits earned at a foreign branch, part were applied to paying for certain concessions abroad, and were never remitted to this country. It was held that the company was liable to assessment in respect of the whole of its profits, including those not remitted to England, on the grounds, according to *Esher M.R.*<sup>3</sup>, that the bank had only one business, that carried on in London, and that the business was not, at all events, carried on wholly abroad. The clearest authority for the rule, however, is the case of *San Paulo Brazilian Railway Company Ltd. v. S. G. Carter*<sup>4</sup>. The appellant company was registered in England. It owned a railway in Brazil, which was worked under the control of the English directors. The accounts were kept in England, but the whole revenue arose from money received in Brazil. On behalf of the company it was admitted that the company was resident in England, and the question was where it carried on its trade. The principle was laid down that if the trade of a company

<sup>1</sup> It has been held in Scotland by the Court of Sessions, which is of course not bound by the authority of *San Paulo Brazilian Railway Co. v. Carter*, that a company resident in Norway carried on the whole of its trade in Glasgow. *James Wingate & Co. v. Inland Revenue* (1897), *Cas. C. Sess.* 4th sec., p. 24. The case can have no authority on this point in England.

<sup>2</sup> (1891) 2 Q.B., p. 378.

<sup>3</sup> *At p. 382.*

<sup>4</sup> (1896) A.C., p. 31; *cp. Liverpool & C. Insurance Co. v. Bennett* (1911), 2 K.B., p. 577.

is carried on partly in the United Kingdom, then the company is assessable under the first case of section 100 of 5 & 6 Vict. c. 35 on the whole of its profits, and not under the 5th case on that part only of its profits received in this country: and it was held that this company's trade was carried on at least partly in England. "The direction and supreme control," said Lord Davey<sup>1</sup>, "is vested in the board in London. The business is therefore carried on in and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country." It follows from this case and the preceding case that whenever a company is directed and controlled here, it exercises its trade here within the meaning of the schedule, at least in part. When it is controlled here, it is resident here: so whenever a company is resident here it exercises its trade here in part, and is liable to assessment on the whole of its profits wherever received. The rule thus established has been followed in several subsequent cases. In *Denver Hotel Company Ltd. v. Andrews*<sup>2</sup> which came on for trial immediately after the San Paulo case, the case under consideration was that of an English company formed to work an hotel at Denver. The directing power was exercised in London. Dividends were paid to the American shareholders out of funds received at Denver, and not transmitted to England. It was held that the case was governed by the rule laid down in the San Paulo case, and that the dividends paid in America were liable to assessment. In *Grove v. Elliots and Parkinson*<sup>3</sup> it was held that an English company formed to carry on business as miners and mineral oil merchants in Galicia, the affairs of which were controlled by a London board of directors, was liable to assessment in respect of profits retained to sink new wells in Galicia.

A trade controlled here is a trade carried on here, whether the control be exercised over the trade itself, or over a dependent foreign company which carries on the trade. This was established in *Apthorpe v. Peter Schoenhoven Brewery Company*<sup>4</sup>, where the circumstances closely resembled those of the case of *Bartholomay Brewery Company v. Wyatt* (*sup.*). An English company worked

<sup>1</sup> At p. 42.

<sup>2</sup> (1895) 3 Tax Cases, p. 356.

<sup>3</sup> (1896) 3 Tax Cases, p. 481.

<sup>4</sup> (1898) 14 T.L.R., p. 370, s.c. C.A. (1899), 80 L.T., p. 395.

a brewery in the United States through an American company. It was held that the English company was liable to assessment in respect of its whole profits whether received in this country or not, on the grounds that the ultimate controlling power was exercised in England, and that this amounted to a carrying on of the business here, at least in part. Wright J. said the case was governed by the *San Paulo* case, and disregarded the decision in *Bartholomay Brewery Company v. Wyatt*; and his judgment was confirmed by the Court of Appeal. This decision was followed in *Frank Jones Brewing Company v. Apthorpe*<sup>1</sup> and in *St Louis Brewery Ltd. v. Apthorpe*<sup>2</sup>, cases very similar in their circumstances. In these *Wills J.*<sup>3</sup> said he would assume that the American corporation was a separate entity, and that the English company had no direct power to give orders to the American directors: and yet practically the English company, which owned all the shares in the American corporation, was carrying on the business of managing the American corporation. He treated *Bartholomay Brewery Company v. Wyatt* as overruled by the *San Paulo* case.

A company controlling a foreign company from the United Kingdom is liable to assessment on the profits earned by the latter, on the grounds that by reason of its power of control it is exercising the trade of the latter, or perhaps, the trade of managing the latter, in the United Kingdom. But in order that it may be said to be exercising that here, and be held liable, it must exercise or be entitled to exercise an absolute control over the foreign company. If the foreign company is substantially independent, then the English company, which is not controlling it, cannot be said to exercise in the United Kingdom the trade carried on by the foreign company. It is therefore not liable to assessment in respect of the whole profits earned by the foreign company under case 1 of Schedule D of 5 & 6 Vict. c. 35 s. 100, as of a trade exercised in this country: but only under case 5 of the Schedule in respect of such parts of those profits as are actually received in this country. This was the substance of the decision in *Kodak Ltd. v. Clark*<sup>4</sup>.

<sup>1</sup> (1898) 15 T.L.R., p. 113.

<sup>2</sup> (1898) 79 L.T., p. 551, s.c. 15 T.L.R., p. 112; see also *United States Brewery Co. Ltd. v. Apthorpe* (1898), 4 Tax Cases, p. 17.

<sup>3</sup> At p. 113.

<sup>4</sup> (1902) 2 K.B., p. 450, s.c. C.A. (1903), 1 K.B., p. 505.

An English company carrying on business in the United Kingdom owned 98 per cent. of the shares in a foreign company. The remaining shares were held by independent persons, and there was no evidence that the English company exercised any powers of management over the foreign company. It was held that the foreign company was not controlled by the English company, and that the English company was not assessable to income tax under the first case of Schedule D of s. 100 upon the full amounts of the profits of the foreign company. The grounds of the decision were that there was an independent body of shareholders: and hence that the foreign company was not in substance identical with the English company, and its business was its own, and not that of the English company. The decision in the *Gramophone and Typewriter Ltd. v. Stanley*<sup>1</sup> went even further in this direction: and distinctly circumscribes the effect of *Apthorpe v. Peter Schoenhoven Brewery Company Ltd.*<sup>2</sup> It was held that an English company which owned all the shares in a German company did not nevertheless control the German company, and could not therefore be said to exercise the trade of the German company so as to be liable to assessment in respect of all its profits, but only of that part of them actually received in this country. The principle was laid down that for an English company to be liable to assessment in respect of the profits of a foreign company in which it is interested the foreign company must be merely the agent of the English company and it was said that in the case of *Apthorpe v. Peter Schoenhoven Brewery Company* there was such a relationship. It may therefore be assumed as a general rule that an English company will not be held to be exercising a trade abroad through a foreign company unless it bears to the latter the relation of a principal to his agent.

It will be observed that in these cases of *Kodak Ltd.* and the *Gramophone and Typewriter Ltd.* the English company resident in the United Kingdom was not carrying on its trade wholly abroad, which in view of the decision in the *San Paulo* case is, as has been seen, an impossibility. The company did not escape liability to assessment because its trade was exercised wholly abroad, but because the trade exercised abroad was not its trade at all but that of the foreign company.

<sup>1</sup> (1906) 2 K.B., p. 856, *confd.* (1908) 2 K.B., p. 89.

<sup>2</sup> 4 Tax Cases, p. 41

*A foreign company or other corporation not resident in the United Kingdom which exercises a trade within the United Kingdom is liable to assessment for income tax on that part of its annual profits derived from the trade exercised within the United Kingdom.*

39. Paragraph 2 of Schedule D of section 2 of the Income Tax Act of 1853 provides that income tax is to be payable in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom. In applying this paragraph to foreign companies, the converse of the principle established in *De Beers and Co. v. Howe* and its predecessors has been adopted: and it has been held that a company which has not its centre of administrative business here is not resident here. In *Attorney-General v. Howe*<sup>1</sup> the company under consideration was the Imperial Ottoman Bank, a company created by Turkish law, whose statutes fixed its seat at Constantinople. It took over and carried on the business of an English bank in London, and the annual meetings of its shareholders were held in London. The governing body consisted of a director general, two assistant directors, and a council of administration of three, resident at Constantinople; all of whom were elected by a committee of English and French shareholders, which met in London or Paris and had some powers of control over the officers of the bank. It was held that the company resided at Constantinople if it resided anywhere: and that it was not liable to assessment on its whole profits, but only on the profits arising in respect of the business carried on in England. It follows that a company which has its centre of administrative business outside the United Kingdom is liable to be assessed in respect of that part of its profits only which is derived from that part of its trade which is exercised within the United Kingdom.

It must often be a difficult matter to determine whether a foreign company which is not resident here is or is not exercising

<sup>1</sup> (1874) L.R. 10 Ex., p. 20.

a trade here, and if it is, what part of its total trade it is exercising here. It should be observed that the principle laid down in the San Paulo case considered above, that a company exercises a part of its trade at least wherever it is controlled, has no application in this connection, because *ex hypothesi* the companies in question are not resident here, which means in other words that they are not controlled here. No definite rule can be laid down as to when a non-resident company exercises a trade here. "There is not," it has been said by Jessel M.R.<sup>1</sup>, "any principle of the law which lays down what carrying on a trade is. There are a multitude of things which together make up the carrying on of a trade. There is no one distinguishing incident, it is a compound fact made up of a variety of things." It was said by Brett L.J. in the same case<sup>2</sup> that wherever profitable contracts are habitually made in England by or for foreigners with persons in England, because they are in England to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contract is done abroad. It is certain therefore that a company may exercise a trade within the meaning of the schedule elsewhere than at the centre of its administrative business, the place from which it is controlled<sup>3</sup>. In the case in which the judgments quoted were delivered it was held that a foreign telegraph company domiciled at Copenhagen, which had cables to the United Kingdom and workrooms here with clerks, was exercising a trade here, and chargeable on its profits from receipts in this country. In the Scottish case of Messrs Wingate and Company v. Inland Revenue<sup>4</sup> the company concerned was the shipping company Chanaral registered at Christiania, where the books of the company were kept, the managers resided, and all formal meetings of the company were held. The managers held two shares in the company. The remaining 93 were held in Scotland, and a Glasgow firm effected all chartering, received funds, and paid dividends direct. It was held that the company resided in Norway, but that the whole of its trade was exercised in the

<sup>1</sup> Erichsen (representative of the London Agency of the Great Northern Telegraph Co. of Copenhagen) v. Last (1881), 8 Q.B.D., p. 414.

<sup>2</sup> At p. 418.

<sup>3</sup> See per Cotton L.J. s.c., p. 420.

<sup>4</sup> (1897) Cas. C. Sess. 4th sec., p. 24.

United Kingdom and that the whole of its profits were therefore liable to assessment. In both these cases contracts were made by the companies in this country: and amongst the various circumstances referred to by Jessel M.R. as constituting the carrying on of a trade, the making of contracts possesses special importance as determining the place in which the trade is exercised. Thus it has been held that a foreigner who canvasses for orders through agents in the United Kingdom does not exercise a trade here within the meaning of the Schedule so long as all contracts for sale and all deliveries of goods to customers are made abroad<sup>1</sup>.

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*Without the deduction of dividends from foreign companies or other corporations payable to shareholders in the United Kingdom are liable to income tax, and the principle which is entrusted with the payment in the United Kingdom of such dividends are responsible for its deduction.*

40. This is the effect of § 10 of the Income Tax Act of 1853 extending to "the assessing and charging of the duties granted by this Act on all interest, dividends, or other annual payments payable out of or in respect of all the stocks, funds, or shares of any foreign company, society, adventure or concern," the provisions of 5 & 6 Vict. c. 80 for assessing the duties or dividends payable out of the revenues of foreign states.

The effect of the enactment is to compel persons entrusted with the payment of the dividends of foreign companies to deliver an account of them to the revenue authorities, and to deduct and pay the tax thereon before disbursing them. The enactment is extended to the dividends of colonial companies by 24 & 25 Vict. c. 91, s. 36.

Income ought not to be taxed twice over. The profits of a foreign company resident outside the United Kingdom derived from trade exercised in the United Kingdom being taxed once under the second paragraph of Schedule D of § 2 of the Income Tax Act of 1853, they ought not to be taxed again under the section under discussion if they are distributed as dividends in this country. This was decided in the case of *Gilbertson v.*

<sup>1</sup> *Grainger v. Gough* (1896), A.C., p. 325; see also *Werle & Co. v. Colquhoun* (1888), 20 Q.B.D., p. 753; *Watson v. Sandie & Hull* (1898), 1 Q.B., p. 326.

Ferguson<sup>1</sup>. A foreign company, the Imperial Ottoman Bank, carried on business abroad<sup>2</sup>, and had an agency in London where it carried on business and earned profits, on which income tax was assessed, and paid by the London agency. Dividends were paid to English shareholders by the London agency out of the general earnings of the company: and a further assessment was made upon the whole of those dividends. But it was held that the company ought only to be further assessed in respect of the portion of the dividends attributable to profits arising outside the United Kingdom, since tax had already been paid under the first assessment upon the portion of the dividends attributable to the earnings of the London agency.

of the

*Stocks or shares in foreign or colonial companies or ever prerogative or bonds of a foreign government are within the jurisdiction of the United Kingdom so as to be subject to death duties, do so, the documents of title thereto are locally situated within the United Kingdom at the time of the death of the testator, and are marketable here, and when only acts to be performed within the United Kingdom, if any, are necessary for their transference.*

41. Section 2 s.s. (2) of the Finance Act of 1894 (57 & 58 Vict. c. 30) provides that "property passing on the death of the deceased when situate out of the United Kingdom shall be included (in the principal value to be taxed) only if, under the law in force before the passing of this Act legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes." The rule stated at the head of this section sets out the conditions under which foreign securities are held to be situated within the United Kingdom, and so, not being included in the exception made by the above section, to be liable to death duties.

The general rule of the Common Law as to the local situation of contract debts is that a simple contract debt is situated within the jurisdiction of the locality where the debtor resides<sup>3</sup>: and that a specialty debt is situated at the place where the specialty

<sup>1</sup> (1879) 5 Ex. D., p. 57.

<sup>2</sup> That the Imperial Ottoman Bank was not resident in the United Kingdom was determined in *Attorney-General v. Alexander* (1874), L.R. 10 Ex. p. 20.

<sup>3</sup> *Fernandes' Executor's Case* (1870), L.R. 5 Ch., p. 314.



is at the creditor's death<sup>1</sup>, unless the debtor is within the United Kingdom, in which case the debt is treated as situated in the United Kingdom wherever the specialty may be found<sup>2</sup>. But these ancient rules do not cover the case of foreign securities. In the leading case of *Attorney-General v. Bouwens*<sup>3</sup> it was held that bonds of foreign governments of which a testator dying in this country was the holder, being transferable within the United Kingdom by delivery only, and no act outside the United Kingdom being necessary to complete the transfer, were within the province of Canterbury so as to be liable to probate duty. The basis of the decision, and of the rule stated at the head of this section, is that such securities, transferable here without the performance of any act abroad, are in the nature of valuable chattels, saleable here<sup>4</sup>. In *Stern v. the Queen*<sup>5</sup> this principle was applied to certificates of shares in a foreign company; and it was held that certificates on which a form of transfer and a power of attorney were endorsed and executed in blank, and which were marketable here and operative by delivery, were liable to probate duty, only acts to be performed within the United Kingdom being necessary for their transference. In the later case of *Attorney-General v. Glendinning*<sup>6</sup> it has been held that a colonial bond to bearer which is negotiable in this country is liable to estate duty if it is actually in England at the death of the testator, even though the bond contains a charge on immoveables in the colony: and in *Winans v. the King*<sup>7</sup> the bonds of foreign governments payable to bearer and negotiable in this country, when actually in this country at the death of the testator, were also held liable.

Shares registered in the colonial register of a British company are deemed to be situated within the United Kingdom, and are liable to estate duty, if the member in whose name they were registered died domiciled in the United Kingdom<sup>8</sup>.

<sup>1</sup> *Payne v. Rex* (1902), A.C., p. 552.

<sup>2</sup> Finance Act, 1894, s. 8 s.s. (1) preserving 25 & 26 Vict. c. 22, s. 39.

<sup>3</sup> (1838) 4 M. & W., p. 171. <sup>4</sup> At p. 191 per Lord Abinger C.B.

<sup>5</sup> (1896) 1 Q.B., p. 211. <sup>6</sup> (1904) 92 L.T., p. 87.

<sup>7</sup> (1907) 23 T.L.R., p. 705, (1910) A.C., p. 27.

<sup>8</sup> The Companies (Consolidation) Act, 1908, § 36 (b); and see *The Indian Securities Act*, 1860.

### Patents and Trademark.

*A patent may be granted to a foreign company or other corporation together with the true and first inventor, or to a foreign company or other corporation alone in the case of an invention communicated from abroad.*

42. The first alternative in this rule is the effect of section 1 (1) of the Patents Act, 1907 (formerly sub-sections 1 and 2 of section 4 of the Act of 1883) which provides that "an application for a patent may be made by any person who claims to be the true and first inventor of an invention, whether he is a British subject or not, and whether alone or jointly with any other person." But a grant cannot be made to a foreign corporation (or any other corporation) alone, except in the case of the second alternative, because a corporation cannot itself be the true and first inventor of anything. But a patent can be granted to a corporation alone in the case of an invention communicated from abroad, because a corporation, although it cannot invent anything itself, can have an invention communicated to it. This was decided in the matter of the application of the Société Anonyme du Générateur du Temple<sup>1</sup>; where it was decided by Sir Richard Webster A.G. that a foreign corporation cannot apply for a patent on the Patent Office Form *A* as the true and first inventor, but that it may apply on form *A* (1) in respect of an invention communicated from abroad, or on form *A* (2) under the international and colonial arrangements referred to in § 103 of the Patents Acts of 1883 (now § 91 of the Act of 1907). "It seems therefore to me plain," he said, "that forms *A* (1) and *A* (2) include a state of circumstances which give rights to foreign corporations, as well as to foreign persons—that is to say, that having become by themselves or by one of their servants possessed of an invention, they can so far as our law is concerned communicate that to an English Patent Agent or to any personal applicant who can bring the invention to this country or communicate to the Patent Office that he is in possession of the invention. Further if a foreign corporation has applied for protection, in accordance with the provisions of section 103, the foreign corporation can avail itself of the rights

<sup>1</sup> (1896) 13 Pat. Cas., p. 54, and see *in re Carez's Application* (1889), 6 Pat. Cas., p. 552.

given by section 103. But I am of opinion that a corporation whether English or foreign cannot apply alone upon form A, which is intended for the case of the personal inventor in this country."

*A foreign company or other corporation can protect its patents in this country from infringement by the same process as a foreign natural person can.*

This is consequential upon the preceding rule. It is a matter of common knowledge that actions by foreign companies for the protection of patents, by establishing their validity and for remedies for infringement, are of constant occurrence in our courts<sup>1</sup>.

*A foreign corporation can protect its trade mark and trade name from fraudulent imitation in this country.*

43. The remedy for the protection of a trade mark which is being fraudulently imitated so as to mislead the public is by an action for an injunction and an account of profits against the fraudulent imitator. This relief is founded on the personal injury caused by the fraud, and exists although the injured party resides and carries on his whole business abroad, has no branch business here, and does not sell his goods here. So in the *Collins Co. v. Brown*<sup>2</sup> the plaintiffs, who were a company of the state of Connecticut, made tools with a reputation in the United States and elsewhere. The defendant imported from England into the countries where the plaintiff's goods were sold inferior tools with an imitation trade mark. It was said by Page Wood V.C. that the right to a trade mark was a right of user and a personal right, and that a fraud upon it must be redressed in the country in which it was committed. "It is a fraud," he said<sup>3</sup>, "which I apprehend every civilised community will arrest at the fountain head wherever it finds it commenced and about to be

<sup>1</sup> See e.g. *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1903), 88 L.T., p. 490; *Washburn & Moen Tea Co. v. Cunard S.S. Co.* (1889), 5 T.L.R., p. 592; *English Machinery Co. v. Campbell Mining Co.* (1895), 39 Sol. Jo., p. 449.

<sup>2</sup> (1857) 3 K. & J., p. 423.

<sup>3</sup> The *Collins Co. v. Cowen* (1857), 3 K. and J. at p. 431 in which the facts were similar to those in the *Collins Co. v. Brown*. See also the *Collins Co. v. Reeves* (1858), 4 Jur. N.S., p. 865.

perpetrated." There is no property in a trade mark. It is not a thing to be possessed, but a right the infringement of which may be prevented, and that can only be done by striking at the origin of the injury.

If a trade mark be improperly registered in this country by a foreign corporation, it may be expunged from the register on the motion of the injured party<sup>1</sup>. Such a motion may properly be made on the Comptroller alone, informal notice being given to the foreign company, including in this term a Scottish or an Irish company<sup>2</sup>. Notice of motion to rectify the register by removing a trade mark registered in the name of a foreign company not carrying on business within the jurisdiction should be served on the Comptroller alone. Service of such a notice on the foreign company is bad, the court having no power to give leave to serve it outside the jurisdiction<sup>3</sup>.

The right of a foreign company to use and protect its trade name was maintained in *La Société Anonyme des Anciens Établissements Panhard et Levassor v. Panhard Levassor Motor Company, Ltd.*<sup>4</sup> in which the right was asserted against fraudulent infringement. It was held that a foreign company whose goods were imported into England could restrain piracy of its trade name irrespective of whether it had an English agency or not. It was said by Powell J.<sup>5</sup> that "this court would certainly interfere to protect a foreign trader which has a market in England from having the benefit of his name annexed by a trader in England who assumes that name without any sort of justification," and the defendant company and the signatories of its memorandum of association were restrained from using the plaintiff's name, or allowing the company to remain registered in that name.

*Saunders v. Sun Life Assurance Company of Canada*<sup>6</sup> exhibits the same right defended against bona fide opposition. The defendant company was incorporated in Canada under that name, and had carried on business there for ten years. It then

<sup>1</sup> *In re Trade Mark of La Société Anonyme des Verreries de l'Étoile* (1894), 1 Ch., p. 61.

<sup>2</sup> *In re King & Co.'s trade mark* (1892), 2 Ch., p. 462.

<sup>3</sup> *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (1891), 3 Ch., p. 451.

<sup>4</sup> (1901) 2 Ch., p. 513.

<sup>5</sup> At p. 516.

<sup>6</sup> (1897) 1 Ch., p. 537; see also *Hendriks v. Montagu* (1881), 17 Ch. D., p. 638.

opened an office in London and claimed the right to carry on business here under the same name. An action was brought by the English Sun Life Assurance Society, a corporation more than 80 years old, for an injunction to restrain the Canadian Company from carrying on business under a corporate name so similar to that of the English Society: but it was held that though the defendants had no right to use any abbreviated form of their name omitting the words "of Canada," yet in the absence of fraud their name, including those words, involved no misstatement of fact and could not be restrained.

### **Transfer of Shares.**

*The legal incidents of the transfer in this country of shares in a foreign company are governed by the law of this country.*

44. The rights and liabilities of one as a member of a foreign company which result from his ownership of a share in the company are matters concerning the constitution of the company, and the rights of its members *inter se*, and are therefore matters to be regulated by the personal law of the company, the law of the country in which it is domestic. But the manner in which property in the documents of title to a share in a foreign company may be transferred in this country is a matter which affects the interests of members of the public, not members of the company, and must be regulated by our territorial law. A share in a company is commonly represented by some document. The manner in which property in that document can be transferred has no effect on the rights and liabilities which result from its ownership, and the rules of the territorial law may be applied to govern the transfer without interfering with the constitution of the company.

This principle was adopted and applied in the concurrent cases of *Colonial Bank v. Cady and Williams*, and *London Chartered Bank of Australia v. Cady and Williams*<sup>1</sup>, in which it was held that the law governing the right to certificates for stock in a railway company of the State of New York, fraudulently transferred by way of pledge in England, was the

<sup>1</sup> (1890) 15 A.C., p. 267; see also *Colonial Bank v. Hepworth* (1887), 36 Ch. D., p. 36; *Lee v. Abdy* 17 Q.B., p. 309; and *Smallpage's case* (1885), 30 Ch. D., p. 598.

law of England. It was said by Lord Watson<sup>1</sup> that "the interest in the railway company's stock which possession of these certificates confers upon a holder who has lawfully acquired them must depend upon the law of the company's domicile. But the parties to the various transactions by means of which the certificates passed are all domiciled in England and it is clear that the validity of the contracts of pledge must be governed by the rules of English law": and by Lindley L.J. in the Court of Appeal<sup>2</sup>, "we must look to the American law for the purpose of understanding the constitution of the Railway Company and the proper mode of becoming a shareholder in it. The consequences of having acquired a title to the certificate may depend on American law. But the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all. The certificates are chattels and when we are considering who is entitled to a chattel bought or sold or pledged in England it is English law and not American law that is to govern the case." Another application of this principle is to be found in those decisions in which the law of England has been supplied to determine whether shares in a foreign company are negotiable or not<sup>3</sup>.

### **Foreign Sovereigns, States and Governments.**

45. Neither the British Empire, nor the United Kingdom, nor the Kingdom of England, has juristic personality in our law: they are not capable of suing or being sued, or of making or breaking contracts. Our state is represented in the eyes of the law by the royal corporation sole, called the Crown, or Rex or Regina, or by the name of the reigning monarch. But this is a special feature of our law. Foreign countries which derive their legal systems from the law of Rome personify the state and attribute to it the properties of a corporation. A foreign state, when it performs acts in the law in this country, is in its own eyes a foreign corporation. The law of England however contemplates it differently, and impressed with its own experience of a royal

<sup>1</sup> At p. 276.

<sup>2</sup> (1888) s.c. C.A. 38 Ch. D., p. 388 at p. 403.

<sup>3</sup> London & County Banking Company Ltd. v. London and River Plate Bank Ltd., 20 Q.B.D., p. 232.

corporation sole, does not fully admit that the foreign state can be a juristic person, the subject of rights. It insists, in the case of monarchical states, that the monarch must personally represent his subjects in this country.

Of the King of Spain as suitor it has been said that "this is the case of a foreign corporation sole<sup>1</sup>" and Spanish lawyers have thus been provided with a subject for research. "The sovereign in a monarchical form of government," it has been said by Lord Cairns<sup>2</sup>, "may as between himself and his subjects be a trustee for the latter. But in the courts of Her Majesty as in diplomatic intercourse,—it is the sovereign and not the state, or the subjects—that is recognised. From him individually is an ambassador received. In him individually is the public property assumed by other States—to be vested." It is in the case of a republican government only, which bears more superficial resemblance to a corporation, that our law admits that the state can be represented by a juristic person. "In a Republic on the other hand," he continues, "the public property is held to remain in the state itself and not in any officer of the state; it is with the state that the diplomatic intercourse is conducted."

These are however rules of procedure rather than principles of substantive law. It is admitted that in substance "every government in its dealings with others necessarily partakes in many respects of the character of a corporation. It must of necessity be treated as a body having perpetual succession, it would not be represented by all or any of the individuals of whom it is from time to time composed<sup>3</sup>"; it is said that a state "is a body so far corporate as not to present to the court as a suitor any one individual<sup>4</sup>"; and that, in short, "the case of a foreign government is the case of a corporation<sup>5</sup>." In general therefore the rules of our law applying to foreign corporations apply also to foreign states. The general rules must however be modified in so far as they are in conflict with or affected by the peculiar privileges enjoyed by the sovereign authorities of foreign states. The effect of these privileges upon the general rules is stated in the following propositions.

<sup>1</sup> *The King of Spain v. Hullet & Widder* (1833), 1 C. & F., p. 333.

<sup>2</sup> *U.S.A. v. Wagner* (1867), L.R. 2 Ch. Ap., p. 582 per Cairns L.J.

<sup>3</sup> *King of Two Sicilies v. Willcox* (1851), 1 Sim. N.S., p. 301.

<sup>4</sup> *Prioleau v. U.S.A.* (1866), L.R. 2 Eq., p. 659.

<sup>5</sup> *Republic of Peru v. Weguelin* (1875), L.R. 20 Eq., p. 140.

*A foreign sovereign can sue and otherwise initiate legal proceedings in English courts.*

46. Doubt was expressed by Lord Loughborough L.C. in the case of *Barclay v. Russell*<sup>1</sup> whether any foreign sovereign under any denomination could sue in a municipal court of this country. Is it not, he said, matter of application from state to state? But the doubt did not long continue. In *Hallet v. the King of Spain and the Indies*<sup>2</sup> it was said by Lyndhurst L.C.<sup>3</sup> "that a king is entitled to sue as king cannot be disputed—has not the sovereign power of another state the common privilege of mankind?" and by Lord Redesdale, "there can be no doubt that a sovereign may sue. If he cannot there is a right without a remedy—he sues as every sovereign must sue generally speaking, either on his own behalf or on behalf of his subjects." No costs were given to the monarch in this action, although successful in his suit; the reason given being that it would be beneath the dignity of such a plaintiff to award him costs. In *Charles Duke of Brunswick v. the King of Hanover*<sup>4</sup> it was said that a foreign sovereign may sue in this country both at law and in equity. In the *Emperor of Austria v. Day and Kossuth*<sup>5</sup> it was said by Campbell L.C. that a foreign sovereign may sue here for a wrong done to him, in his individual or corporate capacity, or to his subjects; and Kossuth the Hungarian patriot was restrained from manufacturing in England notes for circulation in Hungary purporting to be guaranteed by the Hungarian nation. At the same time it was made clear that an injunction would not be granted to prevent injury to the political privileges of a foreign sovereign, but only to protect his property and that of his subjects. The court would not interfere to prevent a revolution, or to stop smuggling, or to assist a foreign sovereign to enforce any law contrary to our own laws about morality and religion.

A foreign sovereign may sue in respect of the public property or interest of his state; but he is not the only person who may

<sup>1</sup> (1793) 3 Ves. at p. 430.

<sup>2</sup> (1828) 2 Bli. N.S., p. 31, s.c. 1 Dow N.S., p. 169; see also *Le Roy de Espagne v. Pountes*, Rolles Rep., p. 133, and *King of Spain v. Machado* (1827), 4 Russ., pp. 225 and 560.

<sup>3</sup> At p. 47.

<sup>4</sup> (1845) 6 Beav. 1.

<sup>5</sup> (1861) 3 De G. F. & J., p. 217.



sue in respect of them. A minister may be the proper person to sue as, *e.g.*, in the case of a public contract made in his name<sup>1</sup>. But in a general case when the right which it is sought to assert is not that of a particular minister or officer exclusively, or jointly with the sovereign, the proper party to sue is the sovereign, and he cannot be represented for that purpose by a minister or ambassador<sup>2</sup>. The sovereign also is the only person who may sue in respect of his own private interests: he cannot be represented by an ambassador for that purpose<sup>3</sup>.

It was not without difficulty that capacity to sue was extended to foreign republican states. Having no monarch who could be recognised by our courts as representing the state as a royal corporation sole, some difficulty was experienced in determining who it was that could represent the state in our courts. In the *Columbian Government v. Rothschild*<sup>4</sup> it was held by Leach V.C. that though "a foreign sovereign is as well entitled as any individual to the aid of this court in the assertion of its rights" yet the description "*The Columbian Government*" was too vague to sue by, since it made it impossible to secure justice to the defendant. But when the question rose for formal decision on the simple issue it was held that a republican state can sue here on the same footing as a foreign monarch, the republican government being looked upon as a foreign corporation, or though not a corporation strictly speaking, yet as a body so far corporate as not to present to the court as a suitor any one individual<sup>5</sup>. The republic can sue in its own name; it is not bound to sue in the name of any officer of the government, or to join any such officer as a plaintiff upon whom process can be served. The leading case is that of *United States of America v. Wagner*<sup>6</sup>, where an action was brought by the United States of America claiming cotton consigned by the Confederate States to the defendants during the war. It was said by Turner L.J. that "an American corporation could sue in this court in its

<sup>1</sup> *Don Jose Ramos Yzquierdo y Castaneda v. Clydebank Engineering & Ship-building Co.* (1902), A.C., p. 524, a Scottish case.

<sup>2</sup> *Schneider v. Lizardi* (1846), 9 Beav., p. 461.

<sup>3</sup> *Baron Penedo v. Johnson* (1873), 29 L.T. N.S., p. 452.

<sup>4</sup> (1826) 1 Sim., p. 94, but see *Imperial Japanese Government v. P. & O. S. Navigation Co.* (1895), A.C., p. 644, where the Mikado sued by this title.

<sup>5</sup> *Prioleau v. U.S.A. & Andrew Johnson* (1866), L.R. 2 Eq. Cas., p. 659, per Page Wood V.C. at p. 663.

<sup>6</sup> (1867) L.R. 2 Ch. Ap., p. 582.

corporate name, and it cannot surely be right that the State should be in a worse position than the body which it has created." The case of the Columbian Government (*sup.*) was distinguished on the grounds that the Columbian Government was an unknown and undefined body, not necessarily identical with the State of Columbia.

A British Colony is not an independent sovereignty. It has also been held that a Colonial Government is not a corporation<sup>1</sup>. It cannot therefore sue or be sued: or be effectually served with a writ. The Governor and Government are but a collection of individuals, and if they are to be sued, must be sued as such.

*A foreign sovereign cannot be sued or be made otherwise answerable in legal proceedings in English courts.*

47. A foreign sovereign has by reason of his sovereignty personal privilege which exempts him from process in our courts. This principle was stated in *Charles Duke of Brunswick v. the King of Hanover*<sup>2</sup>. The inability to sue a foreign sovereign does not result from any incapacity on his part to make contracts or to perform other acts in the law, but from a personal exemption from the process of the court. This is exemplified in the case of *Munden v. the Duke of Brunswick*<sup>3</sup>, an action on a deed in which it was held that the plea that the deed was made by a sovereign prince was bad. The proper plea would have been that the defendant was a sovereign prince at the time of action brought and plea pleaded. The contract was not void; it was unenforceable.

So in *Gladstone v. Ottoman Bank, its Directors, and the Sultan of Turkey*<sup>4</sup>, it was said by Page Wood V.C.<sup>5</sup>, "an engagement entered into with a foreign government is not enforceable. There is no relief against the breach." The purpose of the action was to prevent the Sultan of Turkey from granting to the Ottoman Bank, and the Ottoman Bank from exercising,

<sup>1</sup> *Sloman v. the Governor and Government of the Colony of New Zealand* (1876), 1 C.P.D., p. 563.

<sup>2</sup> (1845) 6 Beav., p. 1; see also *Hor. Supp. Ves. par. 1*, p. 144.

<sup>3</sup> (1847) 10 Q.B., p. 602.

<sup>4</sup> (1863) 1 H. and M., p. 505; see also *National Bolivian Co. v. Wilson*, 5 A.C., p. 176.

<sup>5</sup> At p. 509.

power to issue bank notes, in infringement of a monopoly previously granted by the Sultan to the Bank of Turkey, and it was held that there was no power to grant an injunction. "If I cannot interfere with the principal," said Page Wood V.C., "how can I interfere with the accessory (the Ottoman Bank)?"

Some doubt was cast upon the absolute nature of the rule by the case of the *Charkieh*<sup>1</sup>. This was a cause of damage instituted by the owners of a ship with which the *Charkieh* had collided in the Thames. The *Charkieh* carried the flag of the Ottoman navy: but it came to England with cargo, was entered at the Customs, and was at the time of the collision under charter to a British subject and advertised to carry cargo to Alexandria. Appearance was entered under protest by the Khedive of Egypt and his minister of marine who pleaded that the *Charkieh* was the property of the Khedive, a reigning sovereign, and exempt from suit; but it was held by Sir Robert Phillimore (1) that the Khedive was not entitled to privilege as a reigning prince, and further, (2) that a suit *in rem* may be entertained even though the owner of the *res* be a foreign sovereign, and that (3) if a foreign sovereign assumes the character of a trader and sends his vessel here to trade he thereby waives his privilege. The second and third of these conclusions, had they been generally accepted, would have considerably qualified and limited the privilege of sovereigns. But the first of the three was alone necessary to his decision: the second and third were therefore made *obiter*, and they have been expressly rejected in subsequent decisions. The decision in the case of the *Parlement Belge*<sup>2</sup> directly negatived the dicta of Sir Robert Phillimore, and for the first time established the rule as to the privilege of a foreign sovereign on a firm and broad basis. It was laid down that by reason of the absolute independence of every sovereign authority, and because of the respect for the independence of other states which is based upon international comity, our courts must decline to exercise any jurisdiction over the person of any sovereign or over the public property of any state, although within our territories: and it was held in particular that the public vessel of a foreign state is not liable to seizure in a suit *in rem* for a collision: and that its immunity is not lost by carrying merchandise for hire. The decision was fully

<sup>1</sup> (1873) 4 L.R.A. and E., p. 59.

<sup>2</sup> (1880) 5 P.D., p. 197 (c.a.).

confirmed by that in *Mighell v. Sultan of Johore*<sup>1</sup>, an action for breach of promise of marriage, in which the court held, dissenting from Sir Robert Phillimore's dicta, that the fact that a foreign sovereign has been resident in this country and made contracts here under an assumed name, as if a private individual, does not amount to a submission to the jurisdiction on his part.

The privilege enjoyed by a foreign sovereign is however enjoyed in respect of his sovereign quality only. In so far as he may be also a subject, he has no privilege. A King of Hanover, for instance, who was also an English peer, was exempt from the jurisdiction of the English courts for acts done as sovereign, but was liable to be sued here in respect of acts performed by him here in his private capacity as a subject. His sovereign character on the other hand prevailed in respect of acts done by him abroad<sup>2</sup>. Circumstances might arise in which it would be necessary to draw a similar distinction in the case of one or other of the chartered companies, which have sovereign rights within their own territories, but are subjects in England<sup>3</sup>. Another case in which a foreign sovereign can be indirectly affected by the process of an English court is where there is a fund or some other property in this country *in medio*, in which a foreign sovereign claims an interest, though it is not his property. In such a case notice of action in respect of the fund or property may be given to the foreign sovereign, so as to give him an opportunity of claiming it<sup>4</sup>. Thus in *Gladstone v. Musurus Bey, Bank of England, and the Sultan of Turkey*<sup>5</sup>, the court granted an injunction restraining the Bank from parting with a fund deposited by the Bank of Turkey with the Turkish Ambassador as security, holding that the fund was not the property of the Sultan, but *in medio*. Where however the fund or other property in this country is the property of the foreign

<sup>1</sup> (1894) 1 Q.B., p. 149; see also *Strousberg v. Republic of Costa Rica* (1881), 44 L.T. N.S., p. 199.

<sup>2</sup> *Charles Duke of Brunswick v. the King of Hanover* (1845), 6 Beav., p. 1.

<sup>3</sup> *Cp. Nabob of Arcot v. the East India Co.* (1791), 3 Bro. C.C., p. 291; s.c. 1 Ves. Jr., p. 371, cp. also *Moodalay v. Morton* (1785), 1 Bro. C.C., p. 470.

<sup>4</sup> *Strousberg v. Republic of Costa Rica* (1881), 44 L.T. N.S., p. 199, see also *Larivure v. Morgan* (1872), L.R. 7 Ch., p. 550; *Foreign Bondholders Corporation v. Pastor* (1874), 31 L.T. N.S., p. 567; *Twycross v. Dreyfus* (1877), 5 Ch. D., p. 605; and *Smith v. Weguelin*, L.R. 8 Eq., p. 198.

<sup>5</sup> (1862) 1 H. and M., p. 495.

sovereign, it cannot be seized or otherwise affected under the process of the courts here<sup>1</sup>.

*A foreign sovereign who initiates legal proceedings in an English court is bound by the rules and practice of the court, and renders himself liable to cross proceedings in mitigation of the relief claimed by him.*

48. The privileges of exemption of a foreign sovereign are personal privileges, and not incapacities. They may therefore be waived, and they are waived when the sovereign by initiating legal proceedings voluntarily submits to the jurisdiction of courts from which he would otherwise be free. He thereby places himself in the position of an ordinary suitor, and must do all things which an ordinary suitor would have to do as conditions of his right to prosecute his suit; even though those acts may involve his appearing in the position of formal defendant to cross proceedings. Thus it must be assumed that he submits to the jurisdiction in respect of cross proceedings in mitigation of the relief claimed by him.

This was decided in the case of the South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord<sup>2</sup>. The defendants held a concession from the plaintiff Republic for the construction of a railway in its territory. The plaintiff Republic sued the defendant company to restrain them from dealing with funds lodged in England in the names of trustees: and the company counterclaimed for damages for libel and for breach of the terms of its concession. It was held that a counterclaim might be made against the Republic; but that it must be strictly limited in substance to matters of defence in mitigation of the relief sought: and that the Republic could not be considered to have "submitted to the general jurisdiction of the court, so as to be capable of being sued here in respect of any matter which would be a proper subject of litigation between them if the two parties were private individuals, both resident in this country, and subject to the jurisdiction of the courts"<sup>3</sup>; and on these grounds both the counterclaims in question were struck out. The effect of this decision is to qualify that in *Strousberg*

<sup>1</sup> *In re Wadsworth and the Queen of Spain* (*sup.*); and *in re De Haber and the Queen of Portugal* (1851), 17 Q.B., p. 171.

<sup>2</sup> (1898) 1 Ch., p. 190 and (1897) 2 Ch., p. 487.      <sup>3</sup> Per North J. at p. 195.

v. the Republic of Costa Rica<sup>1</sup> in which it was said somewhat vaguely that where a foreign sovereign or state has waived privilege by seeking relief in the municipal courts, any claim may be asserted against them by cross action or counterclaim.

A foreign sovereign may be ordered to give security for costs<sup>2</sup>. He must also give discovery. Before the introduction of the modern procedure as to discovery, by s. 24 s.s. 7 of the Judicature Act, which gives to the court before which a cause is pending jurisdiction to order therein discovery in aid of the claim or defence, it was necessary for a party in order to obtain discovery to file a cross bill for that purpose in the Court of Chancery. If the other party were a corporation, he had to join some officer or member of the corporation as defendant to the bill to give discovery<sup>3</sup>. Under this practice it was held that a foreign sovereign who had initiated a suit was bound to answer a cross bill for discovery personally and on oath<sup>4</sup>. The King of Spain, it was said, suing by the title of sovereign, brought with him no privileges which exempted him from the common fare of other suitors<sup>5</sup>. A republican state suing in this country is in the same position as a foreign monarch in respect of such obligations as these; it can only obtain relief subject to the practice of the courts. By reason of the close analogy admitted by our law between it and a corporation, it is subject to some of the rules of procedure applying to corporations alone, and particularly in the matter of discovery. Thus in *Prioleau v. United States of America* and *Andrew Johnson*<sup>6</sup>, it was held, under the former practice, that the United States must put in an answer to a cross bill for discovery, and that proceedings would be stayed until they did so by a proper officer. Under the particular circumstances however, it was held that the President was not the proper person to give discovery, and was improperly joined as defendant to the cross bill for that purpose. So also in the case of *Republic of Costa Rica v. Erlanger* (*sup.*)

<sup>1</sup> (1881) 44 L.T. N.S., p. 199.

<sup>2</sup> *The Newbattle* (1885), 10 P.D., p. 33; see also *Republic of Costa Rica v. Erlanger* (1876), 3 Ch. D., p. 62; and the *Emperor of Brazil v. Robinson & others* (1837), 5 Derol P.C., p. 522.

<sup>3</sup> See *Hare on Discovery*, 2nd edition (1877), p. 55; and 3 *Peers Wims.*, p. 311.

<sup>4</sup> *The King of Spain v. Hullet & Widder* (1833), 1 C. & F., p. 333; s.c. 7 *Bligh N.S.*, p. 359; cp. also *Charles Duke of Brunswick v. the King of Hanover* (1845), 6 *Beav.*, p. 1.

<sup>5</sup> 7 *Bligh N.S.* at p. 393.

<sup>6</sup> (1866) L.R. 2 *Eq. Cas.*, p. 659.

proceedings by the Republic were stayed until they had named some proper person to give discovery: Blackburn J. saying that where a foreign sovereign sues in this country he should as far as possible be put in the same position as a body corporate. The decision in *Republic of Peru v. Wequelin*<sup>1</sup> is to the same effect: where it was said by Hall V.C. that the ordinary practice applicable to a corporation must be adapted as well as it will admit to the case of a foreign government, whether it be a Republic or a Sovereignty.

The old practice as to obtaining discovery from a corporation by joining an officer of the corporation as defendant to the cross bill has been replaced by Order 31 rule 5 of the Rules of the Supreme Court (reproducing s. 51 of the Common Law Procedure Act of 1854), which provides that where a corporation is party to a cause, the other party may apply for leave to deliver interrogatories to any member or officer: and for an order for an affidavit of documents to be made by the proper officer. Under this practice it has been held that the defendant to a bill filed by a sovereign republic is entitled to the usual affidavit of documents from the proper officer<sup>2</sup>.

The jurisdiction of the court over a foreign sovereign in such matters of procedure arises from the waiver of privilege and from the submission to the jurisdiction implied in the initiation of proceedings by the sovereign, and if privilege has not been thus waived, jurisdiction cannot be exercised. So a foreign sovereign might not be joined as defendant to a cross bill for discovery if he was not a party to the original suit<sup>3</sup>.

*The courts of this country take notice of the status of foreign sovereigns and independent states as a matter of public notoriety: or in case of doubt will treat as conclusive a certificate as to their status obtained by the court from the Foreign Office or the Colonial Office.*

49. It is considered by English courts that public policy demands that in questions involving the Sovereignty and extent

<sup>1</sup> (1875) L.R. 20 Eq., p. 140.

<sup>2</sup> *Republic of Liberia v. Imperial Bank* (1873), L.R. 16 Eq., p. 179; s.c. C.A. (1874), L.R. 9 Ch., p. 569; see also *Republic of Liberia v. Roye* (1876), 1 App. Cas., p. 139.

<sup>3</sup> *Queen of Portugal v. Glyn* (1840), 7 C. & F., p. 466.

of the territories of a foreign state, the courts should act in unison with the government, and accept the decision of the government as final. Were any other evidence to be admitted on such questions, regrettable differences and inconsistencies might arise between the decisions of the courts in the sphere of private international law and the action of the state, from which the courts derive their authority, in that of public international law. In the case of *Foster v. Globe Venture Syndicate*<sup>1</sup> in which a question arose as to whether the Suss tribes were independent or subject to the Sultan of Morocco, the court obtained judicial knowledge of the matter by inquiring from the Foreign Office.

The course of procedure there followed was first adopted (at least in a reported case) in the case of *Taylor v. Barclay*<sup>2</sup> in which a question was raised as to the status of the Republic of Guatemala. To prevent demurrer to a bill it was falsely alleged that Guatemala had been recognised by Great Britain as an independent state. The court communicated with the Foreign Office, and being informed that no such recognition had been given, took judicial notice of the falseness of the allegation. So also in *Mighell v. Sultan of Johore*<sup>3</sup> a question being involved as to the status of the Sultan as an independent sovereign, the court communicated with the Secretary of State for the Colonies, and held that it would treat his certificate as conclusive in the matter.

But where the status of the foreign sovereign is a matter of public notoriety, the court will take judicial notice of it without special inquiry. The material circumstance to be considered in this connection is whether or not the sovereign state or government in question has ever been recognised as independent by the British Government. Thus in the *City of Berne in Switzerland v. the Bank of England*<sup>4</sup> it was said by Eldon L.C. that the court could not take notice of a revolutionary government never recognised by the government of this country: and whether the foreign government had been recognised or not was a matter of public notoriety. And in the case of the *Manilla*<sup>5</sup> it was held by Sir W. Scott that the court would not recognise the existence

<sup>1</sup> (1900) 69 L.J. Ch., p. 375.

<sup>2</sup> (1828) 1 Sim., p. 213.

<sup>3</sup> (1814) Q.B., p. 149.

<sup>4</sup> (1804) 9 Ves., p. 347; see also *Thompson v. Powles* (1828), 1 Sim., p. 194.

<sup>5</sup> (1861) 3 De G. F. and J., p. 217.



of the revolutionary government of St Domingo, a revolted French colony, in the absence of any recognition of it by the British Government.

We find the principle applied to the converse case in the *Emperor of Austria v. Day and Kossuth*<sup>1</sup> where it was said by Campbell L.C. that the court was bound to take judicial notice of the fact that the Emperor of Austria was acknowledged by Her Majesty as *de facto* King of Hungary, and that the court could not enter into the question whether he was rightfully so or not<sup>2</sup>. The principle in its application to revolutionary governments was well summarised in the American case of *Gelston v. Hoyt*<sup>3</sup> quoted with approval by Kay J. in the *Republic of Peru v. Dreyfus Brothers & Co.*<sup>4</sup> in which it was said that "it belongs exclusively to governments to recognise new states in the revolutions which may occur in the world: and until such recognition, either by our own government or that to which the new state belonged, we are bound to consider the ancient state of things as remaining unaltered<sup>5</sup>."

<sup>1</sup> (1861) 3 De G. F. and J., p. 217 at p. 221.

<sup>2</sup> (1808) 1 Ed. Ad. Rep., p. 1, and Appendix D, *The Pelican*.

<sup>3</sup> (1818) 3 Wheat., p. 246 at p. 324.

<sup>4</sup> (1888) 38 Ch. D., p. 348 at p. 357.

<sup>5</sup> A discussion of the rights of a revolutionary government as successor of that which it has displaced, or of a restored government as successor of a suppressed revolutionary government, belongs rather to public international law, and does not fall within the scope of this work; but see *Barclay v. Russell* (1793), 3 Ves., p. 423; *Dolder v. Lord Huntingfield* (1805), 11 Ves., p. 283; *King of the two Sicilies v. Willcox* (1851), 1 Sem. N.S., p. 301; *U.S.A. v. Prioleau* (1865), 2 H. and M., p. 559; *U.S.A. v. Mekrae* (1869), L.R. 8 Eq. Cases 69; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D., p. 489; and *Republic of Peru v. Dreyfus Bros. & Co.* (1888), 38 Ch. D., p. 348.

## APPENDIX

### THE STATE AS JURISTIC PERSON

THE law of persons in England knows of no such body as the state. Politicians may speak of the foreign affairs of a certain person which they call the British nation, and of legislation passed on its behalf by its representatives. Contractors may speak of their dealings with a person which they call the Government, and taxpayers of their debts to a person which they call the Revenue. But English law disregards these habits of speech. Not the nation but the King is a subject of rights in public international law; not the Government nor the Revenue but the King is a subject of rights in municipal law. It is he in the eyes of the law and not the state that exercises the two public functions of *imperium* and *gestio*, and the tendency to attribute these to other persons, though it may be natural, is not legal. The law of the United States agrees with its parent in this respect. But in other countries the law considers that it is with a person called the State or the Fisc that a contract is made, and to the same person that taxpayers pay their taxes. For them it is the state that is a subject of rights in public international law, and a juristic person in private law; and the first and greatest of all persons. Personality is necessary to it in order that it may carry on the business of government<sup>1</sup>. It is

<sup>1</sup> Savigny, Vol. 2, §§ 86 and 89; Aubry and Rau, Vol. 1, § 54, p. 185; Vauthier, *Sur les personnes morales*, p. 242; Sacopoulo, p. 27, so also Weiss, "The juristic personality of the State is a consequence, the sanction and the indispensable complement of its political personality. As soon as it exists as a State, it is a juristic person. It is the necessary person, differing in that from other juristic persons which only exist in virtue of an arbitrary and contingent creation by the law." p. 127, *Arch. Dip.* 93. 2 (2) and *op. cit.* p. 390; De Paepe (Clunet 1895, p. 33), *Études sur la compétence civile à l'égard des états étrangers*, p. 23; Calvo, p. 221, § 227.

therefore necessarily a juristic person and needs no law to confer personality upon it. It must be capable of owning real and personal property, of acquiring it and parting with it, of contracting, of suing, and of being sued.

The fiction of English law by which a natural person stands for the nation renders questions relating to the position of states as juristic persons in private international law of less immediate interest to us than to other countries. But English courts are sometimes concerned with the personalities of foreign states, and the conflicts of our laws with theirs, and we cannot therefore escape such questions altogether.

As a subject of rights, in legal systems other than our own, the state is commonly regarded as a juristic person. Its general legal position is therefore the same as that of other juristic persons, except in so far as it has special characteristics not shared by other juristic persons which affect that position. The principal characteristic which states possess and other juristic persons do not is sovereignty; and their position differs principally, therefore, from that of other juristic persons in so far as the possession of this characteristic affects their circumstances.

### *Status.*

The advocates of the restrictive system, those who maintain that express recognition by the state is necessary in order that a juristic person may possess personal status, have for the most part relaxed the severity of that theory in favour of foreign states, but not without reluctance. The relaxation has been reconciled with the theory in the following manner. Every state, it is said, when it is received into the family of nations, receives from all other members of that family a recognition of its personality in public international law. Now the personality of a state is not double. It has not two distinct personalities, a personality in public international law, and a civil personality with which alone private international law is concerned: for these two things are but two attributes of the same personality. Neither are the two at all independent; the one is the necessary consequence of the other since a state cannot discharge its public functions unless it has civil

personality, so as to enable it, for instance, to recover taxes<sup>1</sup>. Recognition of the personality for one purpose therefore necessarily implies recognition for the other also<sup>2</sup>: and the express recognition as a person in public international law of one state by another, supplies just that express recognition which is necessary in order to confer upon it also status as a person in the municipal law of the latter<sup>3</sup>. Against this opinion however it may be argued that although the personality of a state may be single, its two attributes, that of personality in public international law and that of personality in civil law, are entirely distinct. In order to illustrate how complete may be the separation between the two, M. Moreaux, who has been the principal exponent of this doctrine, refers to the cases of the French Senate and Chamber of Deputies. These, it seems, have a personal status in public law, they are not mere collections of individuals: but they have no civil rights and are not juristic persons in civil law. In the same manner, it is argued, the two attributes of a state are not inseparably connected. One could exist without the other: and if they are not inseparably connected, the recognition of one does not necessarily imply the recognition of the other. From the recognition of a state as a member of the family of nations nothing can be implied as to its recognition as a person in civil law. The former recognition is confined to one of its attributes only. It is an act of international politics and not a juridical act. Its effect is a political one, the concession of status as a person in public international law, and not a juridical one, the concession of status as a person in private international law<sup>4</sup>. As a political act moreover, it is generally performed by the executive: whereas such juridical acts as the recognition necessary in order to confer personal status on a foreign corporation can only be performed by the legislature or its delegates<sup>5</sup>. Recognition which

<sup>1</sup> Weiss, p. 401; Ducrocq, *Rev. Dr. Int. Pub.*, 1894.

<sup>2</sup> Fiore, § 321; Lainé, *Archives Diplomatiques*, 193. 2, 150 (2).

<sup>3</sup> Weiss, p. 437, Note 4 (and p. 397) and Vol. 2, p. 391; Laurent, *D. C.* Vol. 4, Nos. 73, 126, 127; *Cass. Belge Pas.*, 1876, 1. 54; *Cass. Gand Pas.*, 1878, 2. 163; *Trib. Dresd. Annales de la propr. industr.* 1877, p. 199.

<sup>4</sup> Cp. also Godifroy, p. 163 (7. 13).

<sup>5</sup> Cp. Moreau, Clunet, 1892, p. 346, following Laurent's first opinion, Vol. 4, § 91, p. 193, which he subsequently abandons, "I admit however," he says, "that this doctrine errs by excess of subtlety; it separates and distinguishes two qualities in the

confers status as a person in civil law can be conferred only by the authority which is capable of affecting the civil law by altering it, adding to it, or taking away from it: and that authority is the legislature and not the executive. In order therefore that it may obtain personal status in civil law, a foreign state must obtain express legislative recognition.

The force of this reasoning must be admitted. If express recognition were necessary in order that a state might possess a personal status in civil law, it is difficult to see how that requirement could be supplied by a recognition given to it for another purpose by an authority different from that whose function it is to confer personal status in civil law. Supposing for instance that express recognition were necessary in this country in order to confer status upon foreign juristic persons, including states. The recognition in order to be effective for its purpose, must have the force of law. But recognition as a person in public international law is conferred by some treaty or executive act performed by the authority of the Crown alone. Treaties and executive acts of this nature cannot override the statutory law; and courts of justice would therefore be unable to consider the recognition conferred thereby, as providing the recognition necessary in order to confer personal status in civil law. Indeed, the doctrine that recognition for the purposes of public International Law includes recognition for the purposes of private law can have even apparent validity in those countries only in which the fact that treaties can override statutes has concealed the essential difference of the two acts. But to those who maintain the liberal system the whole of this discussion can be of little interest. If it be denied that express recognition is necessary to confer personal status on any foreign juristic person, it is immaterial whether in the case of states a particular circumstance amounts to such a recognition or not. On this system, foreign states, like any other foreign juristic person, possess juristic personality in civil law in the same manner and for the same reasons that foreign natural persons possess it.

In order that a state should have status as a person in the civil law of a country it is indeed necessary that it should have

State which are inseparable, and between which in practice no distinction is made, the State as a political body, and the State as a civil person. The State is single and not double," Vol. 4, § 126, p. 251.

been recognised by the proper authorities of that country as a state. But that is not because it needs, or because such recognition supplies, any special recognition of its personality in civil law. It is because, until it has been recognised by the proper authorities of the country as possessing status as a person in public international law, it is in the eyes of that country, and of its courts, non-existent. As far as the recognising state and its courts are concerned, it is recognition as a state by the executive that brings it into existence as a state. But as soon as it comes into existence it is entitled without further formalities to status as a person.

### *The Holy See.*

The status of the Holy See deserves special mention. There are anomalies in its present position, which although they immediately concern public international law only, affect indirectly its position in private international law also. It is a bishopric, of which the Pope is bishop: but it is by some contended that in spite of the abolition of the temporal power in 1870, it is still a state of which the Pope is the sovereign. There has been much controversy concerning the existence of this sovereignty, and its nature and extent, if it exists. It is pointed out on the one hand that papal legates and nuntios are received by the principal Roman Catholic states, and that they share the privileges of ambassadors; that the concordats which regulate the position of the Holy See towards certain states have something of the nature of international agreements; and that the Pope is recognised by international law to possess the right of the spiritual tutelage of all Roman Catholics. For these reasons it is contended that the Holy See is a state, and a person in public international law<sup>1</sup>. On the other hand it is pointed out that since the abolition of the temporal power the Holy See has no territory and no subjects, and no legislative, administrative, or judicial functions. Its authority is purely

<sup>1</sup> Surville and Arthuys, p. 174, note 3; Despagne, *Dr. Int. Pub.*, 2nd ed., p. 147; Weiss, p. 408; Oppenheim, § 104 and authorities there quoted; Surville, *Rev. Critique*, 1894, p. 266; also Lainé, *Clunet*, 1893, 273; Pillet, *Sirrey*, 1895, 2. 57; Ducrocq, *R. Dr. Int. Pub.*, 1894; Michoud, *Rev. Gén. Dr. Int. Pub.*, 1894, 193; Pierantone, *Rev. Dr. Int.*, 1903, 437; Flaischlen, *Rev. Dr. Int.*, 1904, 85; *Cass. Turin*, 1900, 4. 25; Wharton, Vol. 1, § 70, p. 596.

spiritual, and has nothing to do with human laws. It is denied the right to attend international conferences, and its legates and nuncios are received as competent to deal with ecclesiastical affairs only, and not with the international relations of states. For these reasons it is contended that the Holy See is not a state, or the subject of rights in international law<sup>1</sup>.

With the merits of this controversy we are not here concerned. It is enough to point out the relation of the two opinions to private international law. In the first place, if the Holy See has not status as the subject of rights in public international law, neither can it be a juristic person in its own right in private international law. It is then nothing more than an association domiciled in the kingdom of Italy, and the question of its juristic personality must be referred to Italian law and in particular to the Italian "Law of Guaranty" of May 13th, 1871, by which its position is regulated<sup>2</sup>. But even if it is the subject of certain rights in public international law, there are special features in its conditions which seem to prevent that circumstance from having the effect which it would have in the case of any other state, of entitling it to claim also juristic personality in private international law.

The contrary is maintained by the Holy See itself in no doubtful manner. Rejecting any subordinate position, and in particular that which it would occupy under the Italian Law of Guaranty, it is claimed for it by canonists that it possesses full rights as a sovereign state, and full personality in private law as a consequence of those rights. "The Church," it is said, "has been constituted by its divine founder into a true and perfect society which is not bounded by the frontiers of any state or submitted to any civil power, and which exercises its power and its rights freely and for the salvation of mankind in all parts of the earth<sup>3</sup>." With the Church as a spiritual abstraction, human laws, it is recognised, are not concerned; but as a

<sup>1</sup> Westlake, I. p. 38; Moreau, Clunet, 1892, 337. According to Sir J. Coleridge, A.G., the loss of the temporal power did not affect the power of the Crown to enter into diplomatic relations with the Holy See; Hansard, vol. 213, p. 158.

<sup>2</sup> Whether that law has the effect of recognising that the Holy See possesses juristic personality is a matter of controversy amongst Italian lawyers. See the case of M. Rossi (*Rivista di diritto ecclesiastico*, 1899, 59).

<sup>3</sup> Allocution of Pius IX, 1860, December 17, No. 26, *Journ. Hist. et Litt.*, vol. 27, p. 472; and Syllabus of Vatican Council of 1870, acts 39—42.

temporal organisation full juristic personality is claimed on its behalf on these grounds<sup>1</sup>. Such mystical reasoning may be dismissed as at least irrelevant. The Holy See, even if it be admitted to be a state, is deficient in just those qualities which are the reason for admitting that other states must possess juristic personality in private law. They necessarily possess status as persons in private law, and are capable as such of exercising rights of property, of suing and being sued, because they have the business of government to carry on, and such status and capacities are necessary for that purpose. But in the case of the Holy See there is no such necessity. It has no territory and no subjects, nor any legislative or judicial functions to perform. Having nothing to govern, in temporalities at least, it needs no juristic personality in private law, which is claimed by states as the necessary instrument of temporal government. It is necessary to conclude therefore that whatever may be its status in public international law, it has none in private law<sup>2</sup>, unless it is conferred by the local law<sup>3</sup>.

The theory has been advanced that the Holy See, even though it is not a state and entitled thereby to juristic personality in its own right, has nevertheless been so long regarded as a juristic personality throughout the world that it is now entitled to that status as it were by prescriptive custom. A theory which would base a claim to status in private law on an international custom having the effect of a positive international law superposed upon state law, is open to the objection that it is based upon a misconception of the nature of international law. But in the present connection the theory need not be considered from any such general point of view. Whether its theoretical basis is sound or not, it is impossible to reconcile it with the facts. The supposed custom could not in any case be one of much antiquity, for before the abolition of the temporal power in 1870 the States of the Church were possessed of full sovereignty, with a government to carry on, and entitled for

<sup>1</sup> Cp. Affré, *Traité des Biens Ecclésiastiques*, p. 9.

<sup>2</sup> Fiore, *Trattato di Diritto Int. Pubblico*, 3rd ed., vol. 1, § 718; cp. Laurent, vol. 4, p. 76, and Moreau, Clunet, 1892, p. 337; *contra* Weiss, p. 408.

<sup>3</sup> For the status of the Catholic Church in Spain see civil code, 1889, Acts 35 et seq. In the Argentine Republic juristic personality is expressly conferred upon it by Act 33 of the civil code.



that reason to juristic personality in private law. Since that date, the status of the Holy See as a person in private law has been as often denied as asserted, both in international negotiations and in the courts of law; and this is conclusive evidence against the existence of the supposed custom.

The same principles must be applied in determining the status in private international law of the sub-divisions of the Church of Rome, its bishoprics and chapters, and of its subsidiary bodies, colleges, seminaries and religious orders. It is claimed on their behalf that they derive juristic personality from the mere fact of their position as necessary members of the Church of Rome. "If the moral being called the Church," it is said, "exists by right as a spiritual society, it is evidently capable of exercising rights of property. But since it is not the Church which exercises those rights in person, it follows that the establishments which are necessary to it, such as seminaries, parishes, bishoprics, have a capacity which is necessary and which the law cannot refuse them<sup>1</sup>." The validity of this contention depends upon the validity of the claim of juristic personality for the Holy See: if the one fails, the other fails also.

It seems therefore that whatever may be the position of the Holy See, or the Church of Rome, in public international law, in private law it can exercise none of the functions of a state. It has no subjects and no territory, and no legislative or executive functions. It has not therefore, and cannot have, any system of private law. It is no lawgiver, and cannot, amongst other things, endow juristic persons with status or capacities. It can have no domestic juristic persons. By saying that a juristic person is domestic in a certain state, no more is meant than that the laws of that state are its personal law; and if a state has no laws, and no power of making them, then a juristic person cannot be domestic in it. Now the sub-divisions and subsidiary corporations of the Church of Rome if they desire to claim a personal status in private law cannot for this purpose refer to the law of the Holy See, even if it is a state, for there is and can be no such thing as such a law. They must, like any other candidate for recognition as a juristic personality,

<sup>1</sup> Affré, *Traité des Biens Ecclésiastiques*, p. 9.

prove that they are entitled to juristic personality according to the laws of the state in which they are domestic, and like other juristic persons they are domestic in the states in the territories of which the principal centre of their administrative affairs is situated. If they are not entitled to juristic personality according to the law of some other state, such as the kingdom of Italy, they are not juristic persons at all<sup>1</sup>.

<sup>1</sup> Cp. the case of the Marquise Despada, *Clunet*, 1888, p. 524.

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